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Stephanos Bibas

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HARMONIZING SUBSTANTIVE-CRIMINAL-LAW VALUES AND CRIMINAL PROCEDURE: THE CASE OF *ALFORD* AND *NOLO* CONTENDERE PLEAS†

Stephanos Bibas††

Criminal procedure is preoccupied with procedural values such as efficiency, accuracy, informed choice, and procedural fairness. This emphasis comes at the expense of the values of criminal procedure's sibling, substantive criminal law. This Article examines Alford and nolo contendere pleas as case studies in how an obsession with these procedural values blinds courts and scholars to substantive values. Defendants can in effect plead guilty by entering Alford and nolo contendere pleas, even if they protest their innocence or refuse to admit guilt. These pleas risk not only convicting innocent defendants, but also impeding the reform, education, and condemnation of guilty defendants. Moreover, these pleas leave psychological denial mechanisms in place, especially in the case of sex offenders. Regardless of how defendants respond, these pleas muddy the denunciation of the crime instead of vindicating victims as well as the community's moral norms, such as honesty and responsibility. Pleas should be reserved for those who confess. Trials are morality plays designed to acquit innocent defendants and teach lessons to guilty defendants who will not confess, while vindicating their victims and the community. This approach leads to a rethinking of plea procedures and the roles of lawyers, judges, and trials in the criminal justice system.

INTRODUCTION	1362
I. THE PROCEDURALIST APPROACH TO PLEAS	1367
II. THE STATUS QUO ON <i>ALFORD</i> AND <i>NOLO CONTENDERE</i> PLEAS	1370
A. The Law of Nolo Contendere and <i>Alford</i> Pleas	1370
B. The Scholarly Literature	1373
C. Who Uses These Pleas, When, and Why?	1375

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III. ACCURACY AND PERCEIVED ACCURACY.....	1382
A. Convicting Innocent Defendants Is Wrong.....	1382
B. Public Perceptions of the Justice System	1386
IV. VALUES OF THE SUBSTANTIVE CRIMINAL LAW	1388
A. Justifications for Punishment and the Law's Moral Norms.....	1390
B. Reluctance to Confess and the Value of Confession .	1393
C. The Substantive Value of Trials and the Harm of Guilty-but-Not-Guilty Pleas	1400
CONCLUSION	1408

INTRODUCTION

Criminal procedure has for too long treated itself as a subset of constitutional law,¹ in the process distancing itself from substantive criminal law. Although substantive criminal law sometimes discusses how well rules deter, rehabilitate, or exact retribution, these substantive values are largely absent from criminal procedure. Instead, criminal procedure seems to care only about whether procedures are efficient, constitutional, fair, and accurate. This artificial separation is unfortunate. Criminal procedure is not simply a subset of constitutional law. It is a sibling of criminal law, though our narrow curricular blinders keep us from seeing the import of this fact. A procedure may be constitutional, efficient, procedurally fair, and even accurate but still be deeply unwise. If the procedure undermines important values of substantive criminal law, we should reject it no matter how efficient it is.

The divorce of procedure from substance manifests itself in guilty plea procedures.² The standard defense of plea bargaining is that guilty pleas save time and money, reduce uncertainty, and empower parties by promoting freedom of choice.³ These procedural values focus on the choices and costs parties face in court. The standard critique of plea bargaining is that guilty pleas undercut proof beyond a reasonable doubt, adversary hearings, and other procedural safeguards.⁴ Once again, most of these objections rest on procedural values rather than the values of substantive criminal law. This Article

¹ See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 6 (1997) (noting that "[c]riminal procedure is, basically, a subset of constitutional law," and decrying the artificial separation between criminal procedure and substance to which this leads).

² I use the terms "substance" and "substantive criminal law" to distinguish the body of law that defines crimes from the procedures used to enforce them. My focus is not on the *actus reus* and *mens rea* elements of particular crimes, but rather on the justifications for punishment that underlie these crimes.

³ See *infra* notes 31–33 and accompanying text.

⁴ See *infra* notes 37–38 and accompanying text.

does not wade into the broader debate over the desirability of plea bargaining. Instead, it assumes that plea bargaining will persist for the foreseeable future and uses the plea bargaining literature to illustrate the foci of proceduralists: efficiency and autonomy versus accuracy and fairness.⁵

This Article challenges the proceduralist approach to criminal procedure, using two subsets of pleas as case studies.⁶ First, the law has long allowed defendants to plead *nolo contendere*, which means that they refuse to admit guilt but accept punishment as if guilty.⁷ More recently, the Supreme Court has approved so-called *Alford* pleas, in which defendants plead guilty while simultaneously protesting their innocence.⁸ Far from criticizing these practices, Frank Easterbrook and most other scholars praise these pleas as efficient, constitutional means of resolving cases.⁹ Even Albert Alschuler, a leading critic of plea bargaining generally, supports *Alford* pleas as a lesser evil, a way to empower defendants within a flawed system.¹⁰ As long as plea bargaining exists, he maintains, innocent defendants should be free to use these pleas to enter advantageous plea bargains without lying.¹¹ Moreover, guilty defendants who are in denial should be empowered to use these pleas instead of being forced to stand trial.¹² Once again, the terms of the debate are proceduralist: efficiency and autonomy versus accuracy and fairness.

This Article disputes this conventional wisdom. *Alford* and *nolo contendere* pleas are unwise and should be abolished. These procedures may be constitutional and efficient, but they undermine key values served by admissions of guilt in open court. They undermine the procedural values of accuracy and public confidence in accuracy and fairness by convicting innocent defendants and creating the perception that innocent defendants are being pressured into pleading guilty. More basically, they allow guilty defendants to avoid accepting responsibility for their wrongs. Guilty defendants' refusals to admit guilt impede their repentance, education, and reform, as well as victims' healing process. In addition, pleas without confessions muddy the criminal law's moral message. Both kinds of pleas, but especially *Alford* pleas, equivocate; one might call them "guilty-but-not-guilty"

⁵ See *infra* Part I.

⁶ For the sake of brevity, I use "pleas" as a shorthand for pleas of *nolo contendere* and guilty (including *Alford* pleas).

⁷ See *infra* Part II.A.

⁸ See *infra* Part II.A.

⁹ See *infra* Part II.B.

¹⁰ See Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1292, 1296-97 (1975).

¹¹ See *id.* at 1289-92, 1296-98, 1306.

¹² See *id.* at 1298.

pleas.¹³ They permit equivocation and ambiguity when clarity is essential. This equivocation, in turn, undermines denunciation of the defendant and vindication of the victim and the community's moral norms. Sacrificing these substantive goals is too high a price for an efficient plea procedure. Procedures that undercut substance have little point, as the point of procedure is to serve substance. Yet substantive values for the most part are not even on the proceduralists' radar screens.¹⁴ Thus, guilty pleas should be reserved for those who confess.¹⁵ Jury trials should serve not only to acquit innocent defendants, but also to teach guilty defendants and vindicate their victims and the community's moral norms. They are morality plays. Because criminal law's norms include honesty and responsibility for one's actions, criminal procedure should not let guilty defendants dishonestly dodge responsibility and the truth.

Consider the prominent example of Kathleen Soliah, which illustrates why unequivocal guilty-plea confessions serve these values better than equivocal *Alford* and nolo pleas. In the 1970s, Soliah belonged to the Symbionese Liberation Army, a radical San Francisco group that kidnapped Patricia Hearst and tried to kill government officials.¹⁶ Soliah fled to Minnesota and changed her name to Sara Jane Olson.¹⁷ For years, she denied belonging to the Symbionese Liberation Army or taking part in an attempt to bomb two police cars in 1975.¹⁸ Her lawyer expressed interest in negotiating an *Alford* or nolo contendere plea, but the judge and prosecutors would not countenance such a plea.¹⁹ Finally, on October 31, 2001, Olson clearly and unequivocally

¹³ *Id.* at 1294.

¹⁴ This Article does not argue that substantive values should always trump procedural values, nor does it have a simplistic metric for prioritizing or balancing the two. Instead, it argues simply that substantive values ought at least to factor into our vocabulary, our discussion, and our consideration of procedures and procedural rules.

¹⁵ I recognize that many guilty-plea confessions are insincere or induced by extrinsic inducements or pressures, such as plea bargains. As I contend later in the Article, however, even a true but insincere confession is better than no confession at all. It may help to break down the guilty defendant's denial mechanisms as the first step on the road to reform. Even if it does not, it teaches, heals, and vindicates the victim and society's moral norms. See *infra* Part IV.B–C.

¹⁶ See James Sterngold, *70's Radical Pleads Guilty in Bomb Plot*, N.Y. TIMES, Nov. 1, 2001, at A18.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Telephone Interview with Shawn Chapman, Partner, Vorzimer, Masserman & Chapman, and defense counsel to Sara Jane Olson (May 28, 2002); Telephone Interview with Eleanor Hunter, Assistant District Attorney, County of Los Angeles, and prosecutor of Sara Jane Olson (May 28, 2002); see also Declaration of Shawn Snider Chapman ¶¶ 34, 38–39, 41–42 (Nov. 5, 2001) (on file with author) (declaring that a prosecutor rebuffed the idea of a no-contest plea; also declaring that Olson initially refused to admit guilt and the prosecutor suggested that Olson would not have to do so, but later that day the District Attorney insisted that Olson would have to admit guilt as part of a plea agreement).

pleaded guilty to taking part in an attempt to bomb the two cars.²⁰ Immediately afterwards, however, Olson told reporters that she had pleaded guilty to crimes of which she was innocent.²¹ Prosecutors speculated that Olson had changed her story to please her friends and family who had maintained her innocence.²²

Olson's judge, however, refused to countenance this express and instantaneous contradiction, noting that "the integrity of the criminal justice system is at stake."²³ He called Olson in for another hearing and asked her whether she wanted her plea to stand.²⁴ At that hearing, the judge confronted Olson and asked her, clearly and explicitly, if she was in fact guilty.²⁵ She twice said yes and reaffirmed her plea.²⁶ Five days later, Olson again publicly disavowed her guilt and moved to withdraw her plea.²⁷ At the next court hearing, the judge noted that Olson found it psychologically very difficult to admit her crime to herself, her family, and her supporters.²⁸ Relying on her previous admissions and pleas of guilt, the judge denied Olson's motion to withdraw her plea.²⁹ Only after this final ruling did Olson tremble with emotion and say she was sorry for harming others.³⁰

An *Alford* or nolo plea in this case would have undercut important procedural and substantive values and norms. If Olson had entered an *Alford* plea and never admitted guilt, it would have been wrong to punish her without an authoritative trial verdict. Instead of eventually apologizing, she might well have persisted in her denials to herself and to others. Continued denials would have led her friends,

Olson's judge exercised his discretion in refusing to accept an *Alford* or nolo contendere plea, but judges elsewhere often allow such pleas. See *infra* Part II.C. If a different judge had had the case and allowed an *Alford* plea, the outcome would have been very different, as the text goes on to explain.

²⁰ Sterngold, *supra* note 16.

²¹ *Id.*; James Sterngold, *Comments by 70's Radical Cast Doubt on Plea Deal*, N.Y. TIMES, Nov. 2, 2001, at A12.

²² Sterngold, *supra* note 16.

²³ James Sterngold, *70's Radical Reaffirms Guilty Plea*, N.Y. TIMES, Nov. 7, 2001, at A16 (internal quotation marks omitted).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*; James Sterngold, *Waffling Again, 70's Radical Asks to Change Guilty Plea*, N.Y. TIMES, Nov. 15, 2001, at A20.

²⁷ *Change of Plea in Bomb Case Is Challenged*, N.Y. TIMES, Nov. 30, 2001, at A20; Sterngold, *supra* note 26.

²⁸ James Sterngold, *Judge Refuses to Permit Ex-Radical to Reverse Plea*, N.Y. TIMES, Dec. 4, 2001, at A12.

²⁹ *Id.*

³⁰ James Sterngold, *70's Radical Is Sentenced, Then Arraigned in New Case*, N.Y. TIMES, Jan. 19, 2002, at A10; James Sterngold, *A Radical's Tale: Compassion Then Led to Prison Now*, N.Y. TIMES, Dec. 14, 2001, at A24; see also John M. Broder, *In a Quiet End to a Case, 4 Ex-Symbionese Liberation Army Members Plead Guilty to Murder*, N.Y. TIMES, Nov. 8, 2002, at A18 (noting that Sara Jane Olson later pleaded guilty to a related murder, saying "I am truly sorry, and I will be sorry until the day I die").

her family, and the public to doubt the justice of the system. Punishment in these circumstances would undercut the norm of punishing only those known to be blameworthy. In addition, consistent protestations of innocence would hinder closure for the victims and the community. Here, in contrast, Olson clearly admitted guilt in court, making her later denials less credible. The public could more easily believe that she had falsely protested her innocence to save face. In addition, the court could justify its ruling by pointing to Olson's earlier admissions, on the advice of counsel, in open court. The court's action vindicated the norm of not going back on one's word. Furthermore, after the judge confronted her with her earlier admissions, Olson took the first steps toward apology and reconciliation. In short, Olson's admissions of guilt in open court were much firmer bases for conviction, repentance, and closure than an *Alford* or nolo plea would have been.

The remainder of this Article consists of four parts. Part I summarizes the academic debate over plea bargaining, showing how it embodies criminal procedure's emphasis on procedural values. Part II reviews the doctrines that allow *Alford* and nolo contendere pleas, as well as the scholarly articles supporting these doctrines, most of which defend these pleas on proceduralist grounds. Part II also discusses how, when, and why lawyers and clients use these pleas to avoid admissions of guilt. Part III argues that these procedures risk convicting innocent defendants and create the perception that innocent defendants are being convicted. The analysis rests on the conventional procedural values of accuracy and perceived accuracy but looks at them through a moral lens. This type of moral argument is almost unheard of in proceduralist literature, a clue that procedure is adrift from the moral underpinnings of the substantive criminal law.

Part IV moves beyond Part III's conventional procedural values to substantive-criminal-law values. In particular, it critiques *Alford* and nolo contendere pleas from a moral, didactic perspective. Even if these pleas were perfectly accurate and were so viewed, they would undercut reform, moral education, and the vindication of victims and the community's moral norms. Many guilty defendants are in denial and find it hard to admit their crimes to others or even to themselves. For them, *Alford* and nolo contendere pleas are easy ways to remain in denial and still avoid the painful processes of confession or trial. Trials, though less efficient than such pleas, are better at breaking through these denials and beginning the process of reform and healing. Regardless of how defendants respond, convictions after a trial vindicate victims, express outrage, and drive home to defendants the wrongfulness of their crimes. In other words, the social meaning of a jury verdict or guilty plea is much stronger and clearer than an *Alford*

or nolo plea's muddy message. Thus, legislatures should abolish *Alford* and nolo contendere pleas. Until they do so, prosecutors should oppose them, and judges should exercise their discretion to reject them. This Article concludes with thoughts on restructuring plea procedures and lawyers' and judges' roles in serving the norms and values of the substantive criminal law.

I

THE PROCEDURALIST APPROACH TO PLEAS

The dominant approach to guilty pleas and plea bargaining focuses on procedural values such as speed, cost, efficiency, autonomy, accuracy, and certainty. This proceduralist focus largely ignores substantive values such as reform, education, retribution, and vindication of victims and social norms. This Article's purpose is not to take on all pleas and bargains, but to show how proceduralists' emphasis on procedural values comes at the expense of substantive-criminal-law values.

The Supreme Court, for example, has endorsed guilty pleas because they save time and money and because they confer advantages upon both prosecutors and defendants.³¹ Indeed, the Court's main concern is ensuring procedural safeguards such as adequate counsel, knowing and voluntary waivers of rights, and sufficient factual bases.³² Similarly, the criminal bench and bar like plea bargains because they save time and money, cap defendants' sentences, expedite inevitable convictions, and dispose of large caseloads.³³ Though pleas may incidentally serve substantive values (such as quicker incapacitation or re-

³¹ See *Santobello v. New York*, 404 U.S. 257, 260–61 (1971) (stating that plea bargaining “is not only an essential part of the process but a highly desirable part” because pleas save resources, are “prompt and largely final” dispositions, and start the correctional processes promptly); *Brady v. United States*, 397 U.S. 742, 752 (1970) (stressing that guilty pleas benefit both sides by avoiding the burdens and expenses of trial, reducing defendants' maximum punishment, and speeding up final dispositions and punishment); see also Warren Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 931 (1970) (“A reduction from 90 per cent to 80 per cent in guilty pleas requires the assignment of twice the judicial manpower and facilities—judges, court reporters, bailiffs, clerks, jurors and courtrooms. A reduction to 70 per cent trebles this demand.”).

³² See *Santobello*, 404 U.S. at 261–62.

³³ See MILTON HEUMANN, PLEA BARGAINING 24–33, 156–57 (1978) (contending that the bench and bar like plea bargaining because it saves time and money, caps defendants' sentences, and expedites convictions that are almost inevitable, but disputing the hypothesis that caseload pressures explain plea bargaining); George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 893–904, 989–1001 (2000) (defending caseload pressure as an explanation for the growth of plea bargaining in Massachusetts).

Of course, this generalization does not hold true for every single lawyer. A few take criminal court appointments precisely because they want trial experience. Others may prefer to work more hours in order to claim larger fees, at least when fees are computed on an hourly basis. See *United States v. Diaz*, 802 F. Supp. 304, 312 (C.D. Cal. 1992) (complaining about this practice of “fee churning”). These approaches, however, are not the norm.

habilitation), their emphasis is on saving time and money and allowing the parties to choose.

Scholars who support plea bargaining likewise do so because pleas promote procedural values such as speed, cost, efficiency, and free choice. Frank Easterbrook, a leading proponent, views criminal justice as a market system that allows parties to sell procedural rights in exchange for advantageous concessions.³⁴ According to Easterbrook, Robert Scott, and William Stuntz, these sales promote autonomy and efficiency, reduce uncertainty, and save time and money.³⁵ Scott and Stuntz's concerns are primarily procedural: they recognize the need for special safeguards to prevent duress, mistake, unconscionable pressures, and uninformed decisions.³⁶ In other words, they view plea procedures as giving defendants the information and freedom they need to further their own interests and desires. One might call this the autonomy model; it focuses on defendants' current desires instead of seeking to reshape or trump those desires.

Critics of plea bargaining focus on classic procedural values such as accuracy and procedural fairness. Albert Alschuler's and Stephen Schulhofer's objections are numerous, but most fall into two categories. First, plea bargaining undermines structural safeguards by letting prosecutors usurp the neutral judicial role, letting defense counsel cut corners, and avoiding public trials.³⁷ One might call this

³⁴ Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992) [hereinafter Easterbrook, *Plea Bargaining*]; see also Thomas M. Church, Jr. *In Defense of "Bargain Justice"*, 13 LAW & SOC'Y REV. 509, 513-16 (1979) (arguing that defendants make rational decisions to plead or go to trial based on the expected sentence after trial "discounted by the possibility of acquittal"); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 308-09 (1983) [hereinafter Easterbrook, *Criminal Procedure*] (arguing that plea bargaining is a desirable mechanism for setting the price of crime).

³⁵ See Easterbrook, *Criminal Procedure*, *supra* note 34, at 317 ("[T]he autonomy value—the right to waive one's rights as one method of exercising them—[] underlies plea bargaining in this country."); Easterbrook, *Plea Bargaining*, *supra* note 34, at 1975 (noting that defendants who plead "get the process over sooner, and solvent ones save the expense of trial"); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1913-17, 1935-40 (1992) (treating expanded choice as a norm justifying a "presumption of enforceability" of plea bargains and noting that parties enter plea bargains to exchange risks).

³⁶ See Scott & Stuntz, *supra* note 35, at 1918-35 (noting the dangers of substantively unconscionable or unequal outcomes, but arguing that abolishing plea bargains would not help defendants).

³⁷ See Alschuler, *supra* note 10, at 1180, 1306-13; Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 932-34 (1983) [hereinafter Alschuler, *Implementing*]; Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52-53, 85-105 (1968) [hereinafter Alschuler, *The Prosecutor's Role*]; Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining* (pt. 1), 76 COLUM. L. REV. 1059, 1063-67, 1117 (1976) [hereinafter Alschuler, *The Trial Judge's Role*]; Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 49-60 (1988) [hereinafter Schulhofer, *Criminal Justice Discretion*]; Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1987-91 (1992) [hereinafter

the institutional or adversarial perspective. Second, bargaining undercuts accuracy, equal treatment, fairness, and perceptions of fairness by subverting proof beyond a reasonable doubt and other rights, thus putting innocent defendants at risk.³⁸ One might call this the defendants' rights perspective.

To be sure, a few cases and commentators have suggested that plea bargaining might serve or hinder substantive-criminal-law values. With the notable exception of one Alschuler article, none of these discussions of substantive values occupies more than a few pages.³⁹ All

Schulhofer, *Plea Bargaining*]; Stephen J. Schulhofer, *A Wake-Up Call from the Plea-Bargaining Trenches*, 19 LAW & SOC. INQUIRY 135, 136–39 (1994); accord Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 45–61; John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12–19 (1978); David Lynch, *The Impropriety of Plea Agreements: A Tale of Two Counties*, 19 LAW & SOC. INQUIRY 115, 117–26 (1994); Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 572–82 (1977).

³⁸ See Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 657–58, 677–80, 719–20 (1981) [hereinafter Alschuler, *The Changing Plea Bargaining Debate*]; Alschuler, *Implementing*, *supra* note 37, at 932–34; Alschuler, *The Prosecutor's Role*, *supra* note 37, at 72–75, 82–83; Gifford, *supra* note 37, at 58–65; Langbein, *supra* note 37, at 12–19; Schulhofer, *Criminal Justice Discretion*, *supra* note 37, at 74–77; Schulhofer, *Plea Bargaining*, *supra* note 37, at 1981–87; Note, *supra* note 37, at 573–76; see also Alschuler, *The Changing Plea Bargaining Debate*, *supra*, at 664–79 (criticizing plea bargaining because it puts a price on priceless rights and penalizes defendants who reject plea offers out of undue optimism or poor judgment); Alschuler, *supra* note 10, at 1197 n.55 (describing bribery and the perception of bribery in plea bargaining transactions); Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 304, 307, 311–12 (1975) (presenting a statistical analysis finding that prosecutors use deep plea discounts to induce defendants to plead guilty in cases in which they would be unable to secure convictions at trial because the evidence is too weak).

³⁹ The one exception is Alschuler, *The Changing Plea Bargaining Debate*, *supra* note 38, at 661–83, 718–20 (arguing that plea bargains produce systematically unjust sentences that hinge on tactical decisions, do not reflect remorse or promote rehabilitation, and encourage defendants to think they have bought and sold priceless human liberty, penological objectives, and the right to be heard). The other passing references to substantive values are found in *Santobello v. New York*, 404 U.S. 257, 261 (1971) (suggesting that the speed of plea bargaining leads to swifter incapacitation, rehabilitation, and the like); *Brady v. United States*, 397 U.S. 742, 752 (1970) (same); Alschuler, *The Prosecutor's Role*, *supra* note 37, at 106–12 (explaining that plea bargaining leads to an irrational and unjust distribution of sentences, as sometimes prosecutors are tempted to be too lenient and at other times are too harsh); Easterbrook, *Criminal Procedure*, *supra* note 34, at 309 (claiming that plea bargaining frees prosecutors to pursue more defendants, leading to more deterrence); Easterbrook, *Plea Bargaining*, *supra* note 34, at 1975 (same); Gifford, *supra* note 37, at 70–73 (noting that guilty pleas keep victims and the public from seeing retribution meted out and may also undermine rehabilitation); Note, *supra* note 37, at 572–73 (suggesting that the speed of plea bargaining leads to swifter incapacitation, rehabilitation, and the like); Albert W. Alschuler, Book Review, 46 U. CHI. L. REV. 1007, 1022–23, 1041 (1979) [hereinafter Alschuler, Book Review] (reviewing CHARLES E. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* (1978)) (expressing concern that plea bargains sometimes lead to unwarranted leniency and commodify justice); cf. Stanley A. Cohen & Anthony N. Doob, *Public Attitudes to Plea Bargaining*, 32 CRIM. L.Q. 85, 95–97 (1989–90) (discussing an opinion survey finding that a large majority of Canadians opposes plea bargaining because it leads to overly lenient outcomes).

in all, these sporadic references to deterrence, incapacitation, retribution, and rehabilitation are peripheral to the academic and judicial debate.

In short, the recent plea bargaining debate illustrates the proceduralist methodology that pervades criminal procedure. Most recent considerations of plea bargaining stand or fall on procedural values of autonomy, accuracy, efficiency, fairness, and perceived fairness.⁴⁰ They pay little heed to rehabilitation, reform, education, and other substantive-criminal-law values. As Part II explains, this proceduralist approach to pleas in general carries over to *Alford* and *nolo contendere* pleas in particular.

II

THE STATUS QUO ON *ALFORD* AND *NOLO* CONTENDERE PLEAS

The proceduralist approach to plea bargains pervades discussions of *Alford* and *nolo contendere* pleas. Recall that these pleas are the functional equivalent of guilty pleas, except that defendants do not admit guilt and, in *nolo* pleas, are not estopped in later litigation. Most courts and commentators support these pleas, stressing their efficiency and the desirability of letting defendants choose to protect their privacy and dignity. The few who criticize these pleas generally emphasize the danger that innocent defendants may falsely plead guilty. This emphasis on choice, efficiency, and accuracy exemplifies the classic proceduralist justifications for plea bargains discussed above. Subpart A summarizes the law governing these types of pleas. Subpart B surveys the generally favorable academic commentary on these pleas. Finally, subpart C looks at how often defendants use these pleas, in what kinds of cases, and why. Subpart C also contrasts academics' generally favorable reaction to these pleas with the skepticism expressed by judges and prosecutors.

A. The Law of *Nolo Contendere* and *Alford* Pleas

At common law, a defendant could ask the court to impose a merciful sentence without confessing guilt and without estopping

⁴⁰ See Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1124 n.9, 1136-43 (1998) (summarizing the reigning justifications for plea bargaining, most of which rest on "the systemic goal of preserving resources" and only one of which, "the Easterbrook theory," involves maximizing deterrence and suggesting that objections to plea bargaining depend on an "adversarial trial model" that prizes fair results, individuality, and autonomy); see also Douglas D. Guidorizzi, Comment, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 765-83 (1998) (collecting and responding to the main objections to plea bargaining).

himself from later pleading not guilty on the same facts.⁴¹ This procedure became the formal plea of *nolo contendere*, under which the defendant admits guilt for purposes of the present case but creates no estoppel.⁴² Today, the Federal Rules of Criminal Procedure allow defendants to plead *nolo contendere* with the permission of the court.⁴³ Most states likewise allow *nolo contendere* pleas, which are sometimes called no contest pleas, although many of these states require the court's consent.⁴⁴

⁴¹ See, e.g., *The Queen v. Templeman*, 91 Eng. Rep. 54 (K.B. 1702); see also *Hudson v. United States*, 272 U.S. 451, 453–57 (1926) (holding that federal courts may impose sentences of imprisonment following *nolo contendere* pleas, and quoting and discussing 2 HAWKINS, PLEAS OF THE CROWN 466 (8th ed. 1824)); William L. Mills, Jr., Note, 30 N.C. L. REV. 407, 409–10 (1952) (surveying the English common law origins of the plea of *nolo contendere* and collecting sources). But see *State ex rel. Clark v. Adams*, 111 S.E.2d 336, 341 (W. Va. 1959) (stating that courts forbid *nolo contendere* pleas to capital offenses and are split on whether to allow them to offenses punishable by imprisonment); JOHN FREDERICK ARCHIBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES 139 (New York, Banks, Gould & Co. 1846) (stating that *nolo contendere* pleas are available only in misdemeanor cases in which the defendant “desires to submit to a small fine”); Neil H. Cogan, *Entering Judgment on a Plea of Nolo Contendere: A Reexamination of North Carolina v. Alford and Some Thoughts on the Relationship Between Proof and Punishment*, 17 ARIZ. L. REV. 992, 999–1016 (1975) (“With the exception of a handful of cases, judgment on a felony charge was not until 1772, and then only briefly, entered against an accused who refused to confess . . .”).

⁴² *Hudson*, 272 U.S. at 455. Many courts give preclusive effect to guilty pleas in later civil litigation. Others admit guilty pleas into evidence but do not give them preclusive effect, and at least one court has refused to admit guilty pleas into evidence. The *Restatement (Second) of Judgments* is ambivalent about giving preclusive effect to pleas. See generally David L. Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27, 28–29, 30–37 & n.30 (1984) (discussing these cases and the *Restatement (Second)*, and analyzing the problem of preclusion).

⁴³ FED. R. CRIM. P. 11(a)(2)–(3); G. NICHOLAS HERMAN, PLEA BARGAINING §§ 7.12, 8.06 (1997).

⁴⁴ Thirty-eight states and the District of Columbia permit *nolo contendere* pleas. See ALASKA R. CRIM. P. 11(a); ARIZ. R. CRIM. P. 17.1(a)(1); ARK. R. CRIM. P. 24.3(a); CAL. PENAL CODE § 1016(3) (West Supp. 2002); COLO. REV. STAT. § 16-7-205(1)(c) (2002); CONN. R. SUPER. CT. § 37-7; DEL. SUPER. CT. R. CRIM. P. 11(b); D.C. SUPER. CT. R. CRIM. P. 11(a); FLA. R. CRIM. P. 3.170(a); GA. UNIF. SUPER. CT. R. 33.1; HAW. R. PENAL P. 11(a); 725 ILL. COMP. STAT. ANN. 5/113-4.1 (West 1992); KAN. STAT. ANN. § 22-3208(1) (1995); LA. CODE CRIM. PROC. ANN. art. 552(4) (West 1981); ME. R. CRIM. P. 11(a); MD. R. CT. 4-242(a); MASS. R. CRIM. P. 12(a); MICH. CL. R. 6.301(B); MISS. UNIF. CIR. & COUNTY CT. R. 8.04(a)(1); MONT. CODE ANN. § 46-12-204 (2002); NEB. REV. STAT. § 29-1819.01 (1995); NEV. REV. STAT. ANN. § 174.035(1) (Michie 2001); N.H. REV. STAT. ANN. § 605:6 (2001); N.M. DIST. CT. R. CRIM. P. 5-204(A); N.C. GEN. STAT. § 7A-272(c) (2001); OKLA. STAT. ANN. tit. 22, § 513 (1992); OR. REV. STAT. § 135.335(1)(c) (2001); PA. R. CRIM. P. 590(A); R.I. SUPER. CT. R. CRIM. P. 11; S.D. CODIFIED LAWS § 23A-7-2(4) (Michie 1998); TENN. R. CRIM. P. 11(b); TEX. CODE CRIM. PROC. ANN. § 27.02(5) (Vernon 1989); UTAH CODE ANN. § 77-13-1(3) (Supp. 2002); VT. R. CRIM. P. 11(b); VA. CODE ANN. § 19.2-254 (Michie 2000); W. VA. R. CRIM. P. 11(a)(1); WIS. STAT. ANN. § 971.06(1)(c) (West 1998); WYO. R. CRIM. P. 11(a). South Carolina cases indicate that felony defendants are still entering *nolo contendere* pleas even though the South Carolina Supreme Court advised lower courts to refuse such pleas in felony cases. See *Kibler v. State*, 227 S.E.2d 199, 201 (S.C. 1976); see also *Deal v. State*, 527 S.E.2d 112, 112 (S.C. 2000) (indicating that the defendant entered a *nolo contendere* plea to felony possession of contraband by a prisoner); *State v. Munsch*, 338 S.E.2d 329, 329–30

The *Alford* plea gives defendants another way to plead guilty without admitting guilt. In *North Carolina v. Alford*, Henry Alford was charged with the capital crime of first-degree murder and "faced . . . strong evidence of guilt."⁴⁵ Rather than go to trial, he pleaded guilty to second-degree murder, a noncapital crime, while protesting his innocence.⁴⁶ The U.S. Supreme Court held that defendants may knowingly and voluntarily plead guilty even while protesting their innocence if the judge finds "strong evidence of [the defendant's] actual guilt."⁴⁷ In *Alford*, two witnesses testified that the defendant had left his house with a gun saying he would kill the victim and had returned saying he had killed the victim.⁴⁸ The Court noted that Alford's plea was similar to a plea of *nolo contendere*. It held that if a defendant can plead *nolo contendere* while refusing to admit guilt, he should also be able to plead guilty while protesting his innocence.⁴⁹ The Court also suggested that Alford's decision to plead was a reasonable choice to cap his maximum sentence, and therefore the courts should honor it.⁵⁰ Although these pleas are not forbidden by the Constitution, neither are they required. Because defendants have no right to plead guilty, judges may refuse to accept *Alford* pleas and states may forbid them by statute or rule.⁵¹ Most states, however, have followed suit and permitted *Alford* pleas (sometimes called best-interests pleas).⁵²

(S.C. 1985) (indicating that the defendant entered a *nolo contendere* plea to the felony crime of assault and battery of a high and aggravated nature).

⁴⁵ *North Carolina v. Alford*, 400 U.S. 25, 26-27 (1970).

⁴⁶ *See id.* at 27-29.

⁴⁷ *See id.* at 37-38.

⁴⁸ *Id.* at 28.

⁴⁹ *See id.* at 36-38.

⁵⁰ *See id.* at 37-38.

⁵¹ *Id.* at 38 n.11.

⁵² Forty-seven states plus the District of Columbia permit *Alford* pleas (sometimes called best-interests pleas). *See Allison v. State*, 495 So. 2d 739, 741 (Ala. Crim. App. 1986); *Wike v. State*, 623 P.2d 356, 359 (Alaska Ct. App. 1981); *State ex rel. McDougall v. Nastro*, 800 P.2d 974, 975 (Ariz. 1990) (en banc); *Harris v. State*, 620 S.W.2d 289, 291 (Ark. 1981); *In re Alvernaz*, 830 P.2d 747, 758 n.9 (Cal. 1992) (in bank); *People v. Camino*, 508 P.2d 1273, 1274-75 (Colo. 1973) (en banc); *State v. Amarillo*, 503 A.2d 146, 162 & n.17 (Conn. 1986); *Robinson v. State*, 291 A.2d 279, 281 (Del. 1972); *In re Fogel*, 728 A.2d 668, 669-70 & n.1 (D.C. 1999); *Boykin v. Garrison*, 658 So. 2d 1090, 1090-91 (Fla. Dist. Ct. App. 1995); *Goodman v. Davis*, 287 S.E.2d 26, 30 (Ga. 1982); *State v. Smith*, 606 P.2d 86, 88-89 (Haw. 1980); *Sparrow v. State*, 625 P.2d 414, 415 (Idaho 1981); *People v. Barker*, 415 N.E.2d 404, 410 (Ill. 1980); *State v. Hansen*, 344 N.W.2d 725, 727 & n.1 (Iowa Ct. App. 1983); *State v. Dillon*, 748 P.2d 856, 859-60 (Kan. 1988); *Commonwealth v. Corey*, 826 S.W.2d 319, 321 (Ky. 1992); *State v. Blanchard*, 786 So. 2d 701, 703 (La. 2001); *State v. Malo*, 577 A.2d 332, 334 (Me. 1990); *Banegura v. Taylor*, 541 A.2d 969, 971 n.1 (Md. 1988); *Commonwealth v. Lewis*, 506 N.E.2d 891, 892 (Mass. 1987); *State v. Goulette*, 258 N.W.2d 758, 760 (Minn. 1977); *Reynolds v. State*, 521 So. 2d 914, 916 (Miss. 1988); *Brown v. State*, 45 S.W.3d 506, 507-08 (Mo. Ct. App. 2001); *State v. Cameron*, 830 P.2d 1284, 1290 (Mont. 1992); *State v. Rhodes*, 445 N.W.2d 622, 624-25 (Neb. 1989); *State v. Gomes*, 930 P.2d 701, 705 (Nev. 1996); *Wellington v. Comm'r, N.H. Dep't of Corr.*, 666 A.2d 969, 970 (N.H. 1995); *State v.*

Alford and *nolo contendere* pleas differ in two main ways: First, *nolo contendere* pleas avoid estoppel in later civil litigation, while *Alford* pleas do not. Second, defendants who plead *nolo contendere* simply refuse to admit guilt, while defendants making *Alford* pleas affirmatively protest their innocence. By and large, however, *Alford* is a new extension of the age-old *nolo* plea.⁵³ This expansion of the law three decades ago may be no coincidence; *Alford* fit well with the modern liberal emphasis on freedom of contract, autonomy, and informed choice.

B. The Scholarly Literature

Commentators who have considered *Alford* and *nolo contendere* pleas have endorsed them for varying reasons. The most common argument in favor of them is that they resolve cases efficiently and cheaply.⁵⁴ Easterbrook and others support these pleas because they further the interests of defendants, including innocent defendants, who want to avoid worse outcomes at trial.⁵⁵ In other words, these

Hodge, 882 P.2d 1, 3 n.1 (N.M. 1994); *People v. Hicks*, 608 N.Y.S.2d 543, 543-44 (N.Y. App. Div. 1994); *State v. McClure*, 185 S.E.2d 693, 696-97 (N.C. 1972); *State v. Padgett*, 586 N.E.2d 1194, 1197-98 (Ohio Ct. App. 1990); *Ocampo v. State*, 778 P.2d 920, 923 (Okla. Crim. App. 1989); *State ex rel. Juvenile Dep't v. Welch*, 501 P.2d 991, 995 (Or. Ct. App. 1972); *Commonwealth v. Fluharty*, 632 A.2d 312, 315-16 (Pa. Super. Ct. 1993); *State v. Fontaine*, 559 A.2d 622, 624 (R.I. 1989); *Gaines v. State*, 517 S.E. 2d 439, 440-41 (S.C. 1999); *State v. Engelmann*, 541 N.W.2d 96, 101 (S.D. 1995); *State v. Williams*, 851 S.W.2d 828, 830 (Tenn. Crim. App. 1992); *Johnson v. State*, 478 S.W.2d 954, 955 (Tex. Crim. App. 1972); *State v. Stilling*, 856 P.2d 666, 671 (Utah Ct. App. 1993); *State v. Fisk*, 682 A.2d 937, 938 (Vt. 1996); *Perry v. Commonwealth*, 533 S.E. 2d 651, 652 (Va. Ct. App. 2000); *State v. Osborne*, 684 P.2d 683, 687 (Wash. 1984) (en banc); *Kennedy v. Frazier*, 357 S.E.2d 43, 45 (W. Va. 1987); *State v. Garcia*, 532 N.W.2d 111, 115 (Wis. 1995); *Johnston v. State*, 829 P.2d 1179, 1181 (Wyo. 1992).

⁵³ But see Cogan, *supra* note 41, at 1016-22 (arguing that because *Alford* pleas allow the imposition of substantial punishment without the safeguards of confession or trial, they go well beyond the tradition of *nolo contendere* pleas in misdemeanor cases).

⁵⁴ See, e.g., Edward Lane-Reticker, *Nolo Contendere in North Carolina*, 34 N.C. L. REV. 280, 291 (1956) (arguing that "the plea of *nolo contendere* saves times [sic] and has some tendency to expedite judicial business"); Steven E. Walburn, *Should the Military Adopt an Alford[sic]-Type Guilty Plea?*, 44 A.F. L. REV. 119, 140-44 (1998); Case Note, 39 FORDHAM L. REV. 773, 780-82 (1971) (praising *Alford* pleas as facilitating plea bargaining and efficiency, but cautioning that judges must assure themselves that pleas rest on adequate factual bases); Patrick W. Healey, Note, *The Nature and Consequences of the Plea of Nolo Contendere*, 33 NEB. L. REV. 428, 433-34 (1954) (contending that *nolo contendere* pleas "obviate the necessity of the more time-consuming procedure" of trial for defendants who seek to avoid estoppel); Alice J. Hinshaw, Comment, *State v. Cameron: Making the Alford Plea an Effective Tool in Sex Offense Cases*, 55 MONT. L. REV. 281, 302 (1994) (endorsing *Alford* pleas as efficient and fair but calling for revision in the area of sex-offense cases); Curtis J. Shipley, Note, *The Alford Plea: A Necessary but Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063, 1072-74, 1086, 1089 (1987).

⁵⁵ Easterbrook, *Criminal Procedure*, *supra* note 34, at 320; Walburn, *supra* note 54, at 143-44, 160-61; Healey, *supra* note 54, at 434 (suggesting with approval that "a defendant, even though innocent, might desire to plead *nolo contendere* rather than undergo the burdens and expense of trial"); Shipley, *supra* note 54, at 1073, 1089.

pleas promote autonomy by giving defendants a choice that may benefit their interests. Others contend that these pleas protect defendants' dignity, privacy, and autonomy by obviating humiliating public admissions of guilt.⁵⁶ Still others argue that nolo pleas protect "the respectable citizen" who is "technically guilty" but does not deserve such civil disabilities as losing the rights to vote and hold office.⁵⁷ Finally, some commentators claim that *Alford* pleas foster openness between lawyer and client. Without *Alford* pleas, they claim, innocent defendants would lie to their lawyers about their guilt in order to reap the benefits of pleading guilty.⁵⁸

Even Alschuler, who would prefer to abolish plea bargaining altogether, reluctantly endorses *Alford* pleas.⁵⁹ He argues that the *Alford* plea can be a necessary psychological "crutch"⁶⁰ when defendants, against their best interests, refuse to admit guilt because of psychological obstacles, egos, and shame.⁶¹ Even innocent defendants, he argues, should be able to choose *Alford* pleas if they decide that pleading is in their best interests.⁶² Alschuler further claims that if lawyers and judges insist on admissions of guilt, defendants will lie to their lawyers and the court, and defense counsel will pressure clients to confess or lie.⁶³ He argues that *Alford* pleas, though distasteful and offensive, are more honest and fair and less hypocritical. They keep defendants from having to lie, prevent defense lawyers from coercing confessions, and avoid forcing defendants into disadvantageous trials.⁶⁴

The few opponents of *Alford* criticize the plea primarily on proceduralist grounds. For example, John Langbein and others argue that *Alford* pleas undercut proof beyond a reasonable doubt and allow innocent defendants to plead guilty.⁶⁵ Still others object that *Alford*

⁵⁶ See, e.g., *State v. Garcia*, 532 N.W.2d 111, 115 (Wis. 1995) (endorsing *Alford* pleas as a way to allow defendants accused of shameful crimes to "avoid ridicule and embarrassment"). One might question whether these pleas are in fact more dignified, because many in the public may perceive them to be dishonest and manipulative. See *infra* Part III.B. Nonetheless, the important point is that some offenders view these pleas as fig leaves that avert shame and embarrassment. See *infra* Part II.C.

⁵⁷ Mills, *supra* note 41, at 416-17.

⁵⁸ See, e.g., Walburn, *supra* note 54, at 143-44; Shipley, *supra* note 54, at 1074, 1086, 1089.

⁵⁹ See Alschuler, *supra* note 10, at 1292, 1296-97.

⁶⁰ *Id.* at 1304.

⁶¹ See *id.* at 1280, 1287, 1304.

⁶² See *id.* at 1296-98.

⁶³ *Id.* at 1297. He notes that even after *Alford*, many defense lawyers and judges refuse to permit such pleas. See *id.* at 1298-1304. It may seem odd or even troubling that defense lawyers refuse to enter certain pleas, as Alschuler found in many interviews with defense lawyers. See *id.* at 1299-1300. As my findings in Part II.C show, however, defense attorneys now favor both *Alford* and nolo contendere pleas.

⁶⁴ See *id.* at 1296-98, 1306.

⁶⁵ See Gifford, *supra* note 37, at 59-60; Stephen E. Henderson, *Hijacked from Both Sides—Why Religious Extremists and Religious Bigots Share an Interest in Preventing Academic Dis-*

pleas risk being involuntary because coercive pressures are likely to convince reluctant defendants to plead.⁶⁶ David Wexler and Bruce Winick, however, criticize *Alford* pleas because they allow sex offenders to remain in denial. They argue that judges should refuse to accept these pleas, thus forcing defense lawyers to confront their clients with the facts and break down their clients' illusions and denials.⁶⁷

C. Who Uses These Pleas, When, and Why?

A 1997 survey of inmates in state and federal correction facilities provides some statistical evidence that defendants frequently use *nolo contendere* and *Alford* pleas.⁶⁸ The survey reports that approximately 2% of federal defendants pleaded *nolo contendere* and 3% entered *Alford* pleas.⁶⁹ In state courts, the numbers were significantly higher. Approximately 11% of state defendants pleaded *nolo contendere* and 6.5% entered *Alford* pleas.⁷⁰

Although this survey did not analyze pleas by the type of crime, other statistics do break down federal *nolo* pleas by type of crime. In the year ending September 30, 2000, 0.5% of all federal defendants pleaded *nolo contendere*.⁷¹ These pleas tended to cluster in certain categories of cases. For example, 6% of those charged with drunk driving and other traffic offenses pleaded *nolo contendere*.⁷² *Nolo contendere* pleas were also more likely in white-collar crimes such as

course on Criminal Jurisprudence Based on the First Principles of Christianity, 37 IDAHO L. REV. 103, 122–23 (2000); Cogan, *supra* note 41, at 1016–22 (objecting that *Alford* pleas undercut the level of certainty that the common law has historically required before imposing felony punishments); Langbein, *supra* note 37, at 15–16; *see also* Recent Development, North Carolina v. *Alford*, 400 U.S. 25 (1970), 32 OHIO ST. L.J. 426, 433, 438–40 (1971) (criticizing *Alford* as undercutting safeguards for innocent defendants and leading to more pressure to plead and longer sentences for those who do not plead).

⁶⁶ See, e.g., Timothy J. Simmons, Note, 49 N.C. L. REV. 795, 800–801 (1971).

⁶⁷ Wexler and Winick focus on rehabilitation of offenders, but they do not discuss other substantive values or the effect of these pleas on victims or the public. See Jeffrey A. Klotz et al., *Cognitive Restructuring Through Law: A Therapeutic Jurisprudence Approach to Sex Offenders and the Plea Process*, 15 U. PUGET SOUND L. REV. 579, 584–85 (1992) (coauthored by David Wexler); David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279, 285–87 (1993), reprinted in LAW IN A THERAPEUTIC KEY 157–70 (David B. Wexler & Bruce J. Winick eds., 1996); David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 225, 229 (1992) (reproducing substantial portions of Wexler, *supra*, at 285–87); Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL., PUB. POL'Y, & L. 505, 541 (1998).

⁶⁸ CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES 8 tbl.17 (2000), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2000, at app. tbl.D-4 (2001), <http://www.uscourts.gov/judbus2000/appendices/d04sep00.pdf>.

⁷² *Id.*

fraud, counterfeiting, food and drug, and environmental laws.⁷³ Roughly 5% of defendants charged with federal sex offenses pleaded *nolo contendere*.⁷⁴ Finally, anecdotal evidence suggests that *nolo contendere* pleas are popular in antitrust cases.⁷⁵

Of course, federal numbers risk being unrepresentative because most cases and types of crimes are handled primarily at the state level. Because no state statistics break down *Alford* and *nolo* pleas by type of crime, I conducted a series of Westlaw searches for cases involving these pleas. I found more than 18,500 cases involving *nolo contendere* pleas. Of the relevant search results in a random sample, 26% involved drug crimes, 25% involved property crimes (including embezzlements), 23% involved violent crimes, 21% involved sex crimes, and 14% involved white-collar crimes.⁷⁶ A similar search yielded almost 2,500 cases that involved *Alford* pleas. Of the relevant search results in a random sample, 27% of *Alford* pleas involved sex offenses, 27% involved other violent offenses, and 12% involved white-collar offenses.⁷⁷

⁷³ *Id.*

⁷⁴ *Id.* Note, however, that the sample size is quite small because so few sex offenses are federal crimes. One must be cautious about generalizing based on a sample of 4 out of 812 defendants whose cases were not dismissed.

⁷⁵ See STUART L. HILLS, CRIME, POWER, AND MORALITY: THE CRIMINAL-LAW PROCESS IN THE UNITED STATES 175 (1971).

⁷⁶ Between February 12 and March 1, 2002, my research assistant ran the query "OP(PLE! /S "NOLO CONTENDERE" "NO CONTEST")" through the Westlaw databases containing the complete case law of the federal courts and each state and arrived at the results described in the text. It was necessary to break these searches down by state and in some cases by time period, so that the 400-result cap that Westlaw applies to each search would not interfere with an accurate count. The searches found 29,382 state cases and 4,344 federal cases that discussed *nolo contendere* pleas. Spot checks of 220 randomly chosen results confirmed that a majority (121, or 55%) involved defendants who had themselves entered *nolo contendere* pleas, as opposed to cases that merely discussed *nolo contendere* pleas in the abstract. 29,382 times 0.55 yields about 16,160 relevant state cases, and 4,344 times 0.55 yields about 2,389 relevant federal cases. These figures may well underestimate the number of *nolo contendere* pleas, as many will not show up in reported appellate case law because the defendant has waived the right to appeal and never brings an appeal or collateral attack. On the other hand, these numbers may double- or triple-count cases that result in multiple decisions by different courts. Note that the figures in the text add up to more than 100% because some cases involved *nolo contendere* pleas to multiple types of charges.

⁷⁷ Between February 12 and 28, 2002, and again on April 22, 2002, my research assistant ran the query "ALFORD /15 PLE!" through the Westlaw databases containing the complete case law of the federal courts and of each state and arrived at the results described in the text. It was necessary to break these searches down by state so that the 400-result cap that Westlaw applies to each search would not interfere with an accurate count. The searches returned 2,717 state cases and 757 federal cases. Spot checks of 581 state and federal cases confirmed that 60% of the search results involved defendants who had entered *Alford* pleas, as opposed to more abstract discussions of these pleas. 2,717 times 0.60 yields 1884, and 757 times 0.60 yields 586. The percentages in the text were drawn from a random sample of 757 relevant search results from the February search; it is coincidental that this 757 happens to be the same number of search results from the federal search.

To get a sense of when and why lawyers and defendants use these pleas, I interviewed thirty-four veteran prosecutors, judges, and public and private defense lawyers.⁷⁸ I used Westlaw searches to pick states that appear to use *Alford* or nolo pleas frequently (Louisiana, Michigan, Missouri, Pennsylvania, and Ohio) and interviewed attorneys and judges in those states. I contrasted these states with states that forbid both kinds of pleas (Indiana and New Jersey). I followed no scientific method, and of course my sample size was far too small to generate statistically significant results. My methodology was journalistic and impressionistic; it replicated on a much smaller scale the surveys on which Alschuler built his famous articles on plea bargaining.⁷⁹

According to the defense lawyers I interviewed, many if not most defendants are initially reluctant to admit guilt. Defense counsel work with defendants, confront them with the evidence, and bring most around to where they will admit guilt. A small minority of clients remains unwilling to admit guilt even when it would be in their interests to do so. Some go to trial, but others enter *Alford* or nolo pleas. Lawyers estimated that a small percentage of cases is resolved by one of these pleas.

When I asked defense counsel, prosecutors, and judges why they thought these defendants would not admit guilt, their answers tended to converge. The most common barrier to a classic guilty plea is the defendant's fear of embarrassment and shame before family and friends. Defense lawyers work hard to reduce the shame of pleading and to convince families that their family member should plead. One defense lawyer even schedules pleas for late Friday afternoons and misleads clients' families about plea dates, so that his clients can plead more easily in empty courtrooms. Even these shame-reducing measures, however, are not enough for some defendants.

These figures probably underestimate the numbers of *Alford* pleas, as many will not show up in reported appellate case law because the defendant has waived the right to appeal and never brings an appeal or collateral attack. On the other hand, these numbers may double- or triple-count cases that result in multiple decisions by different courts.

⁷⁸ All notes from these interviews are on file with the author.

⁷⁹ See Alschuler, *supra* note 10, at 1181 & n.8; Alschuler, *The Prosecutor's Role*, *supra* note 37, at 52 & n.15; Alschuler, *The Trial Judge's Role*, *supra* note 37, at 1060–61 & n.10. As Alschuler correctly notes, this impressionistic method can be valuable:

Even unverified gossip may be valuable, however, when it "makes sense"—when reflection indicates that our current system of criminal justice would inevitably lead to behavior of the sort described in more than a few cases. Moreover, the hearsay tends to become credible when similar observations are reported by persons with different and opposing roles in the criminal justice system and by persons in independent jurisdictions across the nation.

Alschuler, *supra* note 10, at 1181. This methodology is useful where, as here, better sources of data simply do not exist.

After shame, the reason cited most frequently for defendants' refusal to admit guilt is psychological denial, in which defendants refuse to admit guilt to themselves. Some lawyers also mentioned collateral consequences. For example, an admission of guilt may hurt in a later child-custody battle. Admissions may also scare off prospective employers, whereas *Alford* and nolo contendere pleas make it easier to reassure employers by denying guilt. Furthermore, nolo pleas avert estoppel in collateral civil litigation, especially in automobile accidents. Finally, defendants may use nolo and *Alford* pleas because they were intoxicated and unable to remember the facts. Several lawyers opined, however, that most claims of lost memory or fear of collateral consequences are fig leaves to justify these pleas.⁸⁰ The true reason is more often feelings of shame or guilt.

Almost all interviewees agreed that innocent defendants use these pleas infrequently. Their descriptions ranged from "occasionally" to "extremely uncommon" to "[in]significant" to "very rare."⁸¹ For example, one longtime public defender estimated that he had seen no more than five to ten innocent defendants use these pleas over the last sixteen years. A few defense lawyers did suggest that some defendants enter *Alford* or nolo pleas to crimes more serious than the ones they committed.⁸²

Opinions differed on the kinds of cases in which defendants use these pleas. A few interviewees said that they could not generalize because they use *Alford* and nolo contendere pleas in a variety of cases. But most interviewees thought certain kinds of cases were most likely to involve *Alford* and nolo pleas. By far the largest category of cases is sex offenses. Sex offenders are often in denial and fear shame, rejection by families and girlfriends, and violence by other prisoners.⁸³ A second category is crimes against children or the elderly, especially sex crimes. These include child molestation, incest, and rape, but also

⁸⁰ One longtime public defender, for example, recounted a no-contest plea in a gun-possession case in which the defendant recited a fear of civil litigation, even though it was impossible to see any civil litigation that could have arisen out of the facts.

⁸¹ One defense lawyer opined that innocent defendants are more likely to use classic guilty pleas than *Alford* or nolo contendere pleas. He reasoned that innocent defendants will plead guilty only when they receive an offer too good to refuse, that is, a massive sentencing discount, and prosecutors will offer such large discounts only in exchange for clear admissions of guilt. Another defense lawyer, in a state that forbids *Alford* and nolo contendere pleas, said that he saw a significant number of drug offenders whom he thought were innocent enter classic guilty pleas to earn massive sentence discounts.

⁸² Those whom I interviewed were divided on whether judges and prosecutors rewarded *Alford* and nolo contendere pleas with sentence discounts as large as those given for classic guilty pleas. A majority thought they were equivalent.

⁸³ See Alschuler, *supra* note 10, at 1280, 1286 n.290; Wexler & Winick, note 67, at 229; see also *In re Guilty Plea Cases*, 235 N.W.2d 132, 147 (Mich. 1975) (holding that reluctance to admit to "a particularly sordid crime," such as sexual assault of a child, is an adequate reason to accept a nolo contendere plea).

nonsexual child abuse and neglect. Other interviewees mentioned heinous murders, domestic assaults, batteries, crimes of dishonesty, drunk driving, drugs, and auto accidents (to avoid estoppel in tort suits).

Every defense lawyer whom I interviewed approved of these pleas. They use them as a last resort, a tool for difficult defendants who simply will not admit guilt. Defense lawyers reported that most but not all prosecutors are amenable to *Alford* and nolo pleas, but that judges vary widely and many will not accept them.⁸⁴ In other words, prosecutors and judges are more ambivalent. On the one hand, many see these pleas as efficient ways to dispose of cases and reduce staggering dockets, a top priority. On the other hand, they fear that pleas without admissions of guilt are more vulnerable to appeal or collateral attack, thus undercutting finality. In addition, some prosecutors and especially judges dislike the message that these pleas send. Some judges view criminal justice as a morality play in which defendants should confess and apologize so that victims see justice done and can begin to heal. On this view, pleas without confessions leave victims frustrated and defendants defiant and resistant to treatment. Two defense lawyers suggested that victims or their families sometimes press prosecutors to oppose *Alford* pleas because they want admissions of guilt and apologies. Moreover, some prosecutors and judges worry that pleas by defendants who deny guilt or equivocate undermine public confidence. For example, defendants may deny guilt out of court (the Sara Jane Olson maneuver),⁸⁵ leading family, friends, and the public to suspect injustice. As one judge put it, unequivocal pleas and trials "support[] public trust in the institutions" by impeding later denials. In short, prosecutors and judges sometimes oppose *Alford* and nolo pleas on consequentialist and other moral grounds.

What happens when the law forbids *Alford* and nolo pleas, judges refuse to allow them, or prosecutors refuse to enter them? Some of these cases go to trial, but many defendants eventually admit guilt, as Olson did.⁸⁶ Judges and counsel in states that forbid these pleas agreed that a majority of defendants who deny guilt at plea hearings eventually admit guilt when the only other option is to go to trial.⁸⁷

⁸⁴ *Alford* and nolo pleas often require judges' consent, as well as prosecutors' consent if the pleas are part of plea bargains. See sources cited *supra* notes 44, 52.

⁸⁵ See *supra* text accompanying notes 16–30.

⁸⁶ See *supra* text accompanying notes 16–30.

⁸⁷ See William Schma, *Judging for the New Millennium*, CT. REV., Spring 2000, at 4, 5 (stating that after a judge started refusing to accept nolo pleas in felony sex cases, defense lawyers advised offenders to plead guilty; these defendants all went forward with guilty pleas, the judge was better able to confront defendants with their conduct at sentencing, defendants' families were better able to accept guilt, and victims felt better).

Statistics, though not definitive, suggest that rejection of these pleas does not create a huge number of trials. A National Center for State Courts report collected criminal case-

One judge estimated that although he has balked at no-contest pleas for ten years, only one or two defendants have gone to trial rather than admit guilt. For example, when a judge refused to let two prostitution defendants plead *nolo contendere*, they pleaded guilty a few minutes later. In another case, when a judge refused to accept the guilty plea of a prostitute's customer who refused to admit guilt, the defense lawyer conferred with his client, who later admitted guilt.

Other evidence corroborates my finding that prosecutors and judges are deeply ambivalent about *Alford* and *nolo contendere* pleas. For example, even though federal law permits *Alford* pleas, U.S. Department of Justice policy discourages them.⁸⁸ Because the public may not understand how a defendant who claims innocence can plead guilty, it may suspect prosecutorial overreaching.⁸⁹ Thus, federal prosecutors may not agree to *Alford* pleas absent Department of Justice approval.⁹⁰ If defendants try to enter *Alford* pleas to fewer than all counts without prosecutorial approval, federal prosecutors must discourage them by refusing to dismiss the remaining counts.⁹¹ Indeed, the Antitrust and Tax Divisions go further and oppose all *Alford* and *nolo contendere* pleas.⁹² The Tax Division's explanation is that such pleas undercut collateral estoppel and mislead the public into thinking that the government's case is weak.⁹³ Other prosecutors likewise

processing statistics for twenty-two states in the year 2000. It found that on average 3.3% of cases were resolved at trial, 57.2% were resolved by pleas, 23.3% were resolved by dismissals or *nolle prosequis*, and 16.2% had other unspecified dispositions. NAT'L CTR. FOR STATE CTS., EXAMINING THE WORK OF STATE COURTS, 2001, at 63 (2001), available at http://www.ncsconline.org/D_Research/csp/2001_Files/2001_Front_Matter.pdf. The two jurisdictions that forbid *Alford* and *nolo contendere* pleas had comparable figures, with trial rates only slightly higher than average. In New Jersey, 3.9% of criminal cases went to trial, 68.4% pleaded, 15.2% were dismissed or *nolled*, and 12.4% had other dispositions. In Indiana, 4.3% of criminal cases went to trial, 57.3% pleaded, 35.5% were dismissed or *nolled*, and 3.0% had other dispositions. *Id.*

⁸⁸ U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION (July 1980), excerpted in 6 FED. SENTENCING REP. 317, 328-29 (1994).

⁸⁹ *Id.* at 328.

⁹⁰ *Id.*

⁹¹ *Id.* at 329.

⁹² *New Grand Jury Manual Takes Hard Line*, THE D.O.J. ALERT, May 1992, WL 5 DOJ ALERT 2, at *6; Gerald A. Feffer, *Criminal Tax Investigations*, A.L.L.-A.B.A., Feb. 18, 1988, WL C254 ALL-ABI, at *31.

Perhaps these central policies are high-level efforts to send public messages and enforce consistency by riding herd on line prosecutors. Line prosecutors are tempted to lighten their own workloads by using every tool available to secure pleas, because the long-term impact of any one plea is slight. In contrast, high-level policymakers are more likely to consider systemic, long-term ramifications.

⁹³ Feffer, *supra* note 92, at *31.

disfavor *Alford* and nolo pleas.⁹⁴ Nevertheless, defendants may be able to enter *Alford* and nolo pleas over the government's objections.⁹⁵

Several state courts have followed suit and forbidden *Alford* pleas. For example, the Supreme Court of Indiana has held that judges may not accept guilty pleas accompanied by protestations of innocence.⁹⁶ The court suggested that *Alford* pleas risk being unintelligent, involuntary, and inaccurate.⁹⁷ The Indiana court also argued that *Alford* pleas undercut public respect for the justice system.⁹⁸ Michigan and New Jersey courts agree and also forbid *Alford* pleas.⁹⁹ Arizona permits *Alford* pleas but disfavors them for fear that innocent defendants will plead guilty or that the public will lose confidence in the justice system.¹⁰⁰ Individual judges in other states disfavor *Alford* pleas as well.¹⁰¹ Finally, Alschuler found, contrary to my findings, that many defense lawyers refuse to allow clients to plead guilty if they claim innocence.¹⁰²

This reluctance to accept speedy *Alford* and nolo contendere pleas suggests that they are deeply troubling. Though these pleas are efficient, they disregard other important values—both procedural values such as accuracy and substantive values such as reform, education, and expressive condemnation. Parts III and IV develop these arguments further.

⁹⁴ See HERMAN, *supra* note 43, §§ 7.12, 8.05, 8.06.

⁹⁵ *Id.* § 7.12, at 119; see also HILLS, *supra* note 75, at 175 (stating that between 1959 and 1965, in 96% of cases in which the Antitrust Division opposed nolo pleas, judges nonetheless accepted them).

⁹⁶ *Ross v. State*, 456 N.E.2d 420, 423 (Ind. 1983); *Harshman v. State*, 115 N.E.2d 501, 502 (Ind. 1953).

⁹⁷ See *Ross*, 456 N.E.2d at 422–23 (suggesting that *Alford* pleas risk not being “intelligently and understandingly made, or [may be] inconsistent with the realities of the situation” (quoting *Harshman*, 115 N.E.2d at 502)).

⁹⁸ *Trueblood v. State*, 587 N.E.2d 105, 107 (Ind. 1992), *rev'd on other grounds sub nom.* *Trueblood v. Davis*, 301 F.3d 784 (7th Cir. 2002).

⁹⁹ See MICH. CT. R. 6.302(A), (D)(1) (requiring a court to establish the accuracy of a guilty plea “by questioning the defendant [in order to] support . . . a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading”); *Dep't of Law & Pub. Safety v. Gonzales*, 641 A.2d 1060, 1063 (N.J. Super. Ct. App. Div. 1994) (“New Jersey . . . does not permit the entry of such a plea, commonly referred to as an *Alford* plea.”); *State v. Korzenowski*, 303 A.2d 596, 597 n.1 (N.J. Super. Ct. App. Div. 1973) (“[N]otwithstanding the recent decision in [*North Carolina v. Alford*], except in capital cases, a plea shall not be accepted from a defendant who does not admit commission of the offense.” (quoting a New Jersey Supreme Court directive to assignment judges and county prosecutors)).

¹⁰⁰ *Washington v. Superior Court*, 881 P.2d 1196, 1198 (Ariz. Ct. App. 1994); *Duran v. Superior Court*, 782 P.2d 324, 325 (Ariz. Ct. App. 1989).

¹⁰¹ See, e.g., *Constantopoulos v. Warden*, No. CV-921439S, 1996 WL 409228, at *3 (Conn. Super. Ct. July 1, 1996) (holding that trial counsel's failure to enter an *Alford* plea was not grounds for ineffective assistance of counsel because “trial counsel knew the trial judge looked with disfavor on them and would probably not have accepted it”).

¹⁰² See Alschuler, *supra* note 10, at 1297–1300.

III

ACCURACY AND PERCEIVED ACCURACY

Efficiency is a value in criminal procedure, but it is not the only nor even the most important value. More important is the system's accuracy, and in particular its accuracy in freeing innocent defendants. Although our system goes to great lengths to protect innocent defendants at trial, it perversely makes it too easy for them to plead guilty by allowing *Alford* and nolo contendere pleas. Innocent defendants whose scruples might otherwise prevent them from pleading guilty can use these pleas. Even if innocent defendants want to plead guilty, the law should not go out of its way to promote these unjust results.

This Part argues that *Alford* and nolo pleas disserve the conventional procedural values of accuracy and perceived accuracy. Subpart A rebuts the arguments of Alschuler, Easterbrook, and others and contends that allowing innocent defendants to plead is wrong. Because innocent defendants who plead often overestimate the likelihood of their conviction at trial, the law should encourage them to persevere and win acquittals. Moreover, Easterbrook's utilitarianism ignores the moral imperative to avoid knowingly facilitating injustice. Subpart B considers how *Alford* and nolo contendere pleas undermine public perceptions of the justice system's accuracy and fairness. Part IV then goes beyond Part III's proceduralist approach and explains how these pleas violate important values of the substantive criminal law.

A. Convicting Innocent Defendants Is Wrong

It should go without saying that it is wrong to convict innocent defendants. Thus, the law should hinder these convictions instead of facilitating them through *Alford* and nolo contendere pleas. Nonetheless, Easterbrook, Alschuler, and others favor *Alford* and nolo pleas in part because they enable innocent defendants to plead guilty without lying.¹⁰³ Some of these commentators, notably Easterbrook, assume that increasing the range and ease of choices is always good.¹⁰⁴ But increasing the ease of convicting innocent defendants is a vice, not a virtue. If the law made it harder for innocent defendants to plead guilty, it would minimize both actual and perceived injustices.¹⁰⁵

¹⁰³ See *supra* text accompanying notes 54–64.

¹⁰⁴ See *supra* note 55 and accompanying text.

¹⁰⁵ The supporters of *Alford* pleas note two competing possibilities. On one hand, they claim that if *Alford* pleas were abolished, many innocent defendants would falsely confess and plead guilty anyway. See, e.g., Alschuler, *supra* note 10, at 1286–87, 1306; Walburn, *supra* note 54, at 143; Shipley, *supra* note 54, at 1073–74, 1086. On the other hand, they note that both guilty and innocent defendants may have significant psychological barriers

Easterbrook contends that innocent defendants will plead guilty only when the expected sentence at trial, discounted by the probability of acquittal, is greater than the plea terms offered.¹⁰⁶ Defendants who are advised by competent counsel and have private knowledge of the facts will be in a good position to assess their own chances at trial.¹⁰⁷ Because trials are imperfect and sometimes convict innocent defendants, innocent defendants benefit by having the option of pleading guilty whenever they might be convicted at trial.¹⁰⁸ As Alschuler puts it, "both courts and defense attorneys should recognize a 'right' of the innocent to plead guilty. So long as a defendant has something to gain by entering a plea agreement, it is unfair to deny him the choice."¹⁰⁹

Easterbrook's argument mistakenly treats innocent defendants as fully informed, autonomous, rational actors. Many defendants, however, receive poor advice from overburdened appointed counsel of varying quality whose caseloads and incentives lead them to press clients to plead guilty.¹¹⁰ In addition, criminal discovery is not nearly as

to confession, and predict that abolition of *Alford* pleas would slow down the system and lead to more trials. See, e.g., Alschuler, *supra* note 10, at 1287, 1304 (psychological barriers); Walburn, *supra* note 54, at 141 (efficiency and increased trials); Shipley, *supra* note 54, at 1073, 1086 (same).

These two forces are in tension. To the extent that innocent defendants are reluctant to confess falsely, *Alford* and *nolo contendere* pleas make it significantly easier for them to plead guilty. Removing these options would encourage innocent defendants to go to trial. If, as seems plausible, only a tiny percentage of those charged with crimes are innocent, then the increase in trials of innocent defendants would be relatively minor. If there were no *Alford* or *nolo contendere* pleas, some innocent defendants would still be tempted to confess falsely and plead guilty to earn large sentencing discounts, but others would be more likely to go to trial.

¹⁰⁶ See Easterbrook, *Criminal Procedure*, *supra* note 34, at 311–12.

¹⁰⁷ See *id.* at 309–10.

¹⁰⁸ *Id.* at 320; see also Church, *supra* note 34, at 513–15 (discussing the benefits of plea bargains in general); Scott & Stuntz, *supra* note 35, at 1913–17, 1936–40, 1949–51 (arguing that even innocent defendants may find it in their interests to plead guilty and reap the benefits of certainty and reduced sentences, but noting that limits on discovery may hinder defendants' assessments of the likelihood of conviction).

¹⁰⁹ Alschuler, *supra* note 10, at 1296.

¹¹⁰ See *id.* at 1248–70; Schulhofer, *Criminal Justice Discretion*, *supra* note 37, at 53–56; see also *State v. Lynch*, 796 P.2d 1150, 1156 & n.13 (Okla. 1990) (holding that \$3200 statutory cap on attorneys' fees inadequately compensates counsels who go to trial for the extra time and overhead required); Alison Frankel, *Too Independent*, AM. LAW., Jan./Feb. 1993, at 67, 72 (quoting a public defender's explanation of why some innocent defendants plead guilty: "[W]e don't have enough resources and . . . the system is geared toward putting people away as efficiently as possible." (internal quotation marks omitted)); cf. Alschuler, *supra* note 10, at 1182–86, 1198–1206 (analyzing the motives of non-appointed defense counsel).

Poor counsel would also hinder these same defendants at trial. But the financial incentives to encourage pleas would not affect trials as much because of the large fixed costs involved, and furthermore, lawyers' desires to preserve their reputations by prevailing at trial would counteract financial incentives to cut corners. See Schulhofer, *Criminal Justice Discretion*, *supra* note 37, at 56–59.

extensive as civil discovery, which hampers defendants' accurate assessments of their prospects at trial.¹¹¹ Thus, innocent defendants who want to enter *Alford* or nolo pleas are likely overestimating their risk of conviction at trial.¹¹² Innocent defendants may also plead guilty because of pressure or misinformation; thus their pleas may not be fully intelligent and voluntary.¹¹³ Defendants poor enough to qualify for overburdened appointed counsel and those of low intelligence are most likely to make these mistakes. The result may well be troubling disparities based on wealth, mental capacity, and education. The law should instead encourage these innocent defendants to go to trial.¹¹⁴

There is also a deeper moral objection to Easterbrook's purely utilitarian argument. One should recoil at the thought of convicting innocent defendants. It is all the more troubling to trumpet this fact as an advantage. Not all of ethics is reducible to a consequentialist calculus. There is something profoundly troubling about knowingly facilitating injustice, more so than inadvertently allowing it to happen. No promise of good consequences can erase the repugnance of promoting an evil in the hope of averting a worse evil. To use Dostoyevsky's example, no hope of good consequences can justify society's murdering a single innocent child.¹¹⁵ Kant would agree that society cannot knowingly facilitate the punishment of those who do not deserve it, even if they agree to it.¹¹⁶

The criminal justice system probably does not charge and prosecute many innocent defendants. Some innocent defendants do ex-

¹¹¹ See Schulhofer, *Criminal Justice Discretion*, *supra* note 37, at 78–79.

¹¹² See Schulhofer, *Plea Bargaining*, *supra* note 37, at 1981–82.

¹¹³ See Alschuler, *supra* note 10, at 1191–98, 1287–89 (describing the ways in which defense lawyers whom Alschuler interviewed used lies, misrepresentations, interrogation, cajolery, and psychological pressure “‘almost to the point of coercion’” to procure confessions and guilty pleas) (internal quotation marks omitted)).

¹¹⁴ The counterargument is that poor counsel would harm innocent defendants just as much at trial as in plea bargaining. But, as Schulhofer notes, the incentive and ability to cut corners in low-visibility plea bargaining is much greater than in high-visibility trials, in which the lawyer's reputation is on the line. See *supra* note 110.

¹¹⁵ See FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* 245 (North Point Press, Richard Pevar & Larissa Volokhonsky trans., 1990) (1880).

¹¹⁶ Put another way, if innocent defendants were fully informed, could accurately determine the likelihood of conviction and punishment at trial, and would rationally prefer short but certain sentences to the risk of long sentences after trial, a pure utilitarian like Easterbrook would favor allowing them to plead guilty. See *supra* text accompanying notes 106, 108. A nonconsequentialist, however, would still object that society must not consciously promote guilty and nolo contendere pleas by innocent defendants. Unless one “has committed a crime” and been found guilty and punishable, no amount of benefits can justify punishment. IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 195 (W. Hastie trans., T. & T. Clark 1887) (1796–1797) [hereinafter KANT, *PHILOSOPHY*]; IMMANUEL KANT, *THE METAPHYSICS OF MORALS* *331–*32 (Mary Gregor ed. & trans., 1996) [hereinafter KANT, *METAPHYSICS*]. Even though the courts may accidentally punish some innocent defendants, the state has no right to consciously facilitate this injustice.

ist,¹¹⁷ however, and may be tempted to use *Alford* and nolo pleas instead of going to trial. Though it is impossible to know how many defendants are innocent, many of the lawyers whom I interviewed thought that innocent defendants occasionally used these pleas. Anecdotal evidence also indicates that innocent defendants use these pleas. For example, in the notorious Wenatchee case, twelve defendants entered *Alford* or nolo contendere pleas to child molestation-related charges.¹¹⁸ Two of them later adduced evidence that a complaining child had never been abused but had falsely incriminated them because of coercive police interrogation.¹¹⁹ After the child recanted, these two defendants were eventually allowed to withdraw their pleas.¹²⁰ Extensive media coverage later suggested that the

¹¹⁷ See generally BARRY SCHECK ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000) (describing in detail cases of wrongly convicted defendants).

¹¹⁸ See *Everett v. Perez*, 78 F. Supp. 2d 1134, 1135 (E.D. Wash. 1999) (noting that Harold and Idella Everett entered *Alford* guilty pleas to the charges of sexual abuse); Mike Barber, *Another Child Sex-Ring Defendant Freed*, SEATTLE POST-INTELLIGENCER, Oct. 29, 1999, at C9 (stating that Randall Reed entered an *Alford* plea but later pleaded guilty to assault in exchange for immediate release and dropping a challenge to his conviction); Facsimile from Pat Atkins, Chelan County Clerk's Office, to Keith Vaughn and Stephanos Bibas (Sept. 4, 2002) (on file with author) (confirming that Randall Reed, Lawrence Catcheway, Sid Holt, Barbara "Barb" Garass, and Donna Hidalgo entered *Alford* pleas). A number of these pleas were used by prosecutors to extract lesser convictions in exchange for immediate release from prison after earlier child-molestation convictions were reversed on appeal. See, e.g., *Judge Frees Two Defendants from Sex Ring Cases*, SEATTLE POST-INTELLIGENCER, Oct. 16, 1999, at B1 (stating that Jeannie Bendt and Laura Holt entered *Alford* pleas to child molestation, were sentenced to time served, and were released in exchange for dropping their appeals); *Plea Ends Older Wenatchee Case*, SEATTLE POST-INTELLIGENCER, Dec. 3, 1999, at D6 (stating that Cherie Town entered an *Alford* plea to child molestation and was released immediately in exchange for dropping her appeal of her original molestation convictions); *Two Wenatchee Sex-Abuse Defendants Released*, ASSOCIATED PRESS, June 8, 2000, available at <http://seattlepi.nwsourc.com/local/wenaww.shtml> (last visited June 7, 2002)) (Meredith "Gene" Town and Lawrence D. "Leo" Catcheway entered *Alford* pleas to violating a protective order and assault with sexual intent, respectively, in exchange for vacatur of their earlier convictions and sentences and release from prison); *Wenatchee Woman Convicted in Sex-Abuse Case Is Freed*, SEATTLE POST-INTELLIGENCER, Mar. 5, 1998, at A1 (Linda Miller entered a no-contest plea to lesser charges of communicating with a minor for immoral purposes in exchange for dismissal of molestation charges that she had been convicted of but which had been reversed on appeal).

¹¹⁹ See *Everett*, 78 F. Supp. 2d at 1135–36; *Justice in Wenatchee, but Still a Long Way to Go*, SEATTLE TIMES, Sept. 21, 1998, at B4.

¹²⁰ *Everett*, 78 F. Supp. 2d at 1135–36. Another example of an *Alford* plea by an innocent man occurred in Virginia. Police officers used abusive interrogation techniques to pressure a developmentally disabled man, David Vasquez, to confess to murder; he eventually entered an *Alford* plea on the advice of his lawyer. Investigators later concluded that the crime fit the *modus operandi* of a convicted serial killer, and prosecutors persuaded the Governor to pardon Vasquez. Brooke A. Masters, *Lucky Release from a Life Behind Bars: Va. Man Served 5 Years—Under Plea Agreement—Before Real Murderer Was Found*, WASH. POST, Apr. 28, 2000, at A23.

police investigator had led children to fabricate these and thousands of other allegations of sexual abuse.¹²¹

B. Public Perceptions of the Justice System

The justice system must consider not only what the parties want, but also public perceptions of accuracy and fairness. As Schulhofer points out, justice and punishment are classic public goods.¹²² Allowing innocent defendants to plead guilty creates "serious negative externalities"¹²³ because society has a strong interest in ensuring that criminal convictions are both just and perceived as just. Though one lawyer whom I interviewed cynically suggested that criminal justice is not and should not be about the truth, the public cares a great deal about truth.

Alschuler, however, turns this concern for public perceptions on its head. He praises *Alford* pleas as an honest way to avoid hypocrisy instead of tempting innocent defendants to confess falsely.¹²⁴ But Alschuler's own evidence shows that many lawyers and judges are deeply uncomfortable with this prospect.¹²⁵ The public may be even more uncomfortable, as Alschuler recognizes when he characterizes refusals to accept *Alford* pleas as a "public relations measure."¹²⁶ *Alford* and nolo contendere pleas send mixed messages, breeding public doubt, uncertainty, and lack of respect for the criminal justice system. Far from encouraging honesty, they let guilty defendants cloak their pleas

¹²¹ See, e.g., Mike Barber, *Wenatchee Haunted by Investigations*, SEATTLE POST-INTELLIGENCER, Sept. 10, 1999, at B1; Dorothy Rabinowitz, *Redeeking in Wenatchee*, WALL ST. J., Sept. 21, 1999, at A26; Paul Craig Roberts, *Saved by Pursuit of the Truth*, WASH. TIMES, Apr. 6, 2000, at A16 ("The 1994-95 child sex abuse witch-hunt in Wenatchee, Wash., resulted in a massive frame-up."); see also *Devereaux v. Perez*, 218 F.3d 1045, 1063 & n.36 (9th Cir. 2000) (noting that Wenatchee prosecutors filed 29,727 charges of child sex abuse against 43 adults, few of which held up in court, and that most of the cases rested on a government witness's implausible tale of orgies).

¹²² Schulhofer, *Plea Bargaining*, *supra* note 37, at 1985.

¹²³ *Id.*

¹²⁴ See Alschuler, *supra* note 10, at 1296-98.

¹²⁵ See *id.* at 1280-83, 1299-1301.

¹²⁶ *Id.* at 1285; see also *id.* at 1296 (recognizing that his position may seem "cynical"). Alschuler hints at a revolutionary goal of fomenting the overthrow of plea bargaining by exposing its internal contradictions. See *id.* at 1298 ("Ultimately, . . . the civilized solution . . . would be to eliminate the dilemma that confronts assertedly innocent defendants under the guilty-plea system When our consciences cause us to deny the coercive character of the system that we have created, we magnify its injustice as we delude ourselves."). Allowing *Alford* and nolo pleas, however, will more likely maintain the status quo and cause growing public cynicism about the entire system.

in innocence.¹²⁷ In contrast, jury verdicts and unequivocal guilty pleas suppress residual doubts and promote public confidence.¹²⁸

The justice system should forestall cynicism by forbidding practices that openly promote injustice or public doubts about guilt. As the Supreme Court noted in *Winship*, the law goes to great lengths to minimize the risk of erroneous convictions.¹²⁹ The perception of accuracy is needed "to command the respect and confidence of the community It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."¹³⁰

Public confidence and faith in the justice system are essential to the law's democratic legitimacy, moral force, and popular obedience.¹³¹ When citizens learn that defendants are pleading and being punished while refusing to admit guilt and even protesting their innocence, they may well suspect coercion and injustice.¹³² They also may conclude that our system does not care enough about separating guilty from innocent defendants. Some may believe that the defendant is guilty but refuses to admit it, while others may doubt the defendant's guilt and blame the system's callousness. A system less obsessed with efficiency would slow down and take a closer look at these cases. As a result, the inefficient safeguards of trial might catch some of these injustices. But our obsession with efficiency and autonomy has led us to downplay the importance of justice and the public's perception of justice. This may partially explain why only one-third of the American public expresses confidence in the criminal justice system and why two-thirds think plea bargaining is a problem.¹³³

¹²⁷ As suggested earlier, most defendants who enter *Alford* and nolo pleas are probably guilty. The judges and prosecutors I interviewed feared that defendants will enter *Alford* or nolo pleas and protest their innocence, undermining public trust in the justice system. See *supra* Part II.C. For example, imagine how society would have perceived the Sara Jane Olson case had Olson pleaded guilty without ever admitting guilt.

¹²⁸ See Schulhofer, *Criminal Justice Discretion*, *supra* note 37, at 76–77 (arguing that "in criminal litigation, residual uncertainties *should* be suppressed" at trial or by plea).

¹²⁹ See *In re Winship*, 397 U.S. 358, 363–64 (1970).

¹³⁰ *Id.* at 364.

¹³¹ See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 210–11 (1988); see also Fred W. Friendly, *On Judging the Judges*, in *STATE COURTS: A BLUEPRINT FOR THE FUTURE* 70, 72 (Nat'l Ctr. for State Courts ed., 1978) ("[A] public that is cynical or ignorant about its laws is a lawless one.").

¹³² *United States v. Bednarski*, 445 F.2d 364, 366 (1st Cir. 1971) ("[T]he public might well not understand or accept the fact that a defendant who denied his guilt was nonetheless placed in a position of pleading guilty and going to jail.").

¹³³ See AMERICANS VIEW CRIME AND JUSTICE: A NATIONAL PUBLIC OPINION SURVEY 54–55 & tbl. 4.2 (Timothy J. Flanagan & Dennis R. Longmire eds., 1996) (plea bargaining); Lawrence W. Sherman, *Trust and Confidence in Criminal Justice*, NAT'L INST. JUST. J., Mar. 2002, at 22, 23 (confidence in the system in general).

Because there are no published poll data on *Alford* and nolo contendere pleas, I conducted my own poll of law students.¹³⁴ Approximately 62% of respondents doubted the fairness of hypothetical nolo contendere convictions, and 78% doubted the fairness of hypothetical *Alford* convictions. In addition, nolo contendere pleas led 27% of respondents to have less faith in the criminal justice system. *Alford* pleas led 51% to have less faith in the justice system. Though this small poll is not definitive, it is highly suggestive. Proving a causal link between particular pleas and the justice system's reputation is largely impossible, but prudence counsels erring on the side of caution. A serious concern for safeguarding innocent defendants, justice, and the popular perception of justice would support abolishing or at least severely restricting *Alford* and nolo pleas.

IV

VALUES OF THE SUBSTANTIVE CRIMINAL LAW

The preceding Part opposed *Alford* and nolo contendere pleas based on their actual and perceived inaccuracy and unfairness. Although this conclusion is at odds with the scholarly literature supporting these pleas,¹³⁵ those analyses rested on conventional procedural values. Suppose that we could ensure that defendants entered nolo and *Alford* pleas freely, without coercion or misunderstanding. Further suppose that we could make the pleas perfectly accurate, thus dispelling popular concerns that courts are convicting innocent de-

¹³⁴ In August 2002, my research assistant distributed questionnaires to 746 University of Iowa College of Law students; 138 students responded. There were four versions of the questionnaire, each with a different crime hypothetical: spousal murder, forcible date rape, child molestation, and embezzlement. Each student received only one questionnaire, with one fact pattern. Each questionnaire briefly described the case to simulate what a citizen might learn about a case on the evening news. Each questionnaire also explained briefly what no-contest and *Alford* pleas are and asked students to suppose that the defendant in the case had entered a no-contest or *Alford* plea. When asked how a no-contest plea would affect the respondent's attitude toward the fairness of the hypothetical conviction, 8.0% expressed serious doubts about the conviction's fairness, 54.3% expressed some doubts, and 37.7% said they would have no doubts. When asked the same question about *Alford* pleas, 23.9% expressed serious doubts about the fairness of the conviction, 54.1% expressed some doubts, and 21.7% said they would have no doubts. Another question asked how a no-contest plea would affect the respondent's attitude about the criminal justice system. In response, 2.9% said they would have much less faith in the criminal justice system as a result, 23.9% would have somewhat less faith, 67.4% said their opinions would not change, 5.1% would have more faith, and 0.8% did not respond. The final question asked how an *Alford* plea would affect the respondent's attitude about the criminal justice system. In response, 17.4% said they would have much less faith in the criminal justice system, 33.4% said they would have somewhat less faith in it, 46.4% said their opinions would not change, and 2.9% said they would have more faith. Respondents were most troubled by these pleas in the spousal-murder hypothetical, followed in order by the forcible rape, child molestation, and embezzlement hypotheticals. I will gladly share my survey forms and responses with any interested researcher.

¹³⁵ See *supra* notes 54-64 and accompanying text.

fendants. Even so, these pleas would undercut important values and norms of substantive criminal law. *Nolo* and *Alford* pleas interfere with the defendant's contrition, education, and reform, and send muddled messages that obstruct catharsis and vindication of social norms and victims. Moreover, these pleas let guilty defendants dodge responsibility for their actions. Procedural efficiency does not justify ignoring these important substantive values, because substance is the very *raison d'être* of procedure. Though substantive values need not trump procedural values, they should at least carry significant weight to avoid cannibalizing the law.¹³⁶

Part IV's overt examination of criminal procedure's moral messages will discomfort some readers. Other readers will disagree with this Part's weighing of the moral pros and cons if they value defendants' privacy more highly than reform, victim vindication, and expression of community condemnation. Criminal justice discourse often avoids these objections by shying away from contentious moral disagreements. It seems easier to avoid morality and achieve consensus on seemingly apolitical issues of efficiency, accuracy, and deterrence.¹³⁷ Nonetheless, moral questions lie at the root of criminal procedure. In practice, people judge criminal justice not on technical issues, but on social and moral ones.¹³⁸ These social and moral dimensions are central to evaluating criminal procedures, and ignoring them will not make them disappear.

Subpart A reviews the justifications for punishment that undergird the substantive criminal law. In addition to deterring and incapacitating, the criminal law aspires to reform, educate, vindicate victims, produce catharsis, and express condemnation. Subpart A also reviews the basic moral norms embodied in the criminal law, such as

¹³⁶ Perhaps one could imagine exceptional circumstances in which sacrificing substantive values in a few cases would allow the system to further those substantive values in many more cases. The burden would be on the proceduralists to show that *Alford* and *nolo contendere* pleas in fact satisfy this implausible suggestion. To my knowledge, no one has yet suggested that this is true.

¹³⁷ See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 435 (1999) (arguing that in a liberal polity, we use the language of deterrence as a seemingly value-neutral way to mask contentious moral disagreements, a method which preserves peace but masks the true role that moral judgments play in ascribing blame and punishment).

¹³⁸ See *id.* at 416. Ultimately, Kahan comes to no firm conclusion about whether this suppression of moral discourse is good or bad as a general matter. See *id.* at 476–85. Those who prize suppression of disagreement in a liberal polity will perhaps disagree with my endorsement of overt moralizing. However, the importance of this concern in the context of most criminal laws is questionable. Most crimes, with the possible exception of a few low-level drug possession and other victimless crimes, rest on a widely shared moral consensus about what qualifies as *malum in se*. If there is an unshakable consensus that murder, rape, and robbery are wrong, then it is far from clear that we must hide our shared moral sentiments in order to avoid civic strife. At least in this sphere, avoiding the language of morality may be unduly cautious and inhibit robust, honest debate.

honesty and responsibility for one's actions. Subpart B explores the psychological denial mechanisms of offenders (especially sex offenders) who refuse to admit guilt. It also discusses the therapeutic value of inducing confessions by encouraging and confronting defendants who refuse to admit guilt. Finally, subpart C explains why guilty pleas should be reserved for defendants who confess and thereby take the first steps toward repentance and reform.

A. Justifications for Punishment and the Law's Moral Norms

One influential strand of criminal law scholarship takes a narrow, utilitarian view of the pains and pleasures associated with crimes. According to Jeremy Bentham, criminals commit crimes because doing so benefits them.¹³⁹ To counteract these benefits, the criminal law incapacitates and deters offenders by attaching to crimes sufficiently unpleasant and restrictive punishment.¹⁴⁰

The criminal law does operate in part on this simple level of pleasure and pain, but it also serves other, more morally laden functions. As Kant explained, punishment "ought to be done in order that every one may realize the desert of his deeds."¹⁴¹ The word "realize" has two relevant meanings, both of which Kant appears to mean. First, offenders realize punishments in the way that entrepreneurs realize profits: they reap what they have sown, the retribution that they have earned.¹⁴² Second, punishment is a powerful "*symbol*" of moral blameworthiness that is "medicinal for the criminal and [sets] an example for others."¹⁴³ In other words, punishment reforms and deters in part by educating the offender and society.

Jean Hampton also espoused the theory of punishment as moral education, stating that punishment teaches the offender that the crime is forbidden because it is morally and legally wrong.¹⁴⁴ Punishment is also a strong tool for penetrating callous hearts. In the words of C.S. Lewis, it shatters our illusions and "plants the flag of truth within the fortress of a rebel soul."¹⁴⁵ Punishment seeks to teach by

¹³⁹ See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 170 & n.1 (Clarendon Press 1907) (1823).

¹⁴⁰ See *id.*

¹⁴¹ KANT, PHILOSOPHY, *supra* note 116, at 198; see KANT, METAPHYSICS, *supra* note 116, at *333.

¹⁴² See KANT, METAPHYSICS, *supra* note 116, at *331-32; KANT, PHILOSOPHY, *supra* note 116, at 195-97.

¹⁴³ Letter from Immanuel Kant to J.B. Erhard (Dec. 21, 1792), in KANT: PHILOSOPHICAL CORRESPONDENCE 1759-99, at 199 (Arnulf Zweig ed. & trans., 1967).

¹⁴⁴ See Jean Hampton, *The Moral Education Theory of Punishment*, in PUNISHMENT: A PHILOSOPHY & PUBLIC AFFAIRS READER 112, 115-17, 120-21 (A. John Simmons et al. eds., 1995).

¹⁴⁵ C.S. LEWIS, THE PROBLEM OF PAIN 95 (1962); accord *id.* at 93-95, 120-22; see also 2 NIKOLAI VELIMIROVICH, THE PROLOGUE FROM OCHRID 301 (Mother Maria trans., 1985) (ex-

triggering and developing the offender's sense of guilt. It tries to induce contrition and repentance so that the offender will repudiate his past wrongful act and avoid committing it again.¹⁴⁶ As R.A. Duff notes, punishment tries "to bring the criminal to understand the nature and implications of her crime; to repent that crime; and *thus*, by willing her own punishment as a penance which can expiate her crime, to reconcile herself with the Right and with her community."¹⁴⁷ In a similar vein, Stephen Garvey sees punishment as a secular version of atonement, a way of reconciling offenders with victims and reintegrating them into the community.¹⁴⁸ Before offenders can atone and be reconciled, however, they must first accept responsibility, learn their lessons, and resolve to mend their ways.¹⁴⁹ Of course, some offenders will learn these lessons only in part, and some not at all. Nonetheless, the law respects their moral agency by trying to teach them the errors of their ways. The hope is that punishing offenders increases the chance that they will repent and change their ways. Scholars and commentators too often overlook this idea of repentance and atonement when they discuss the justifications of punishment.

Regardless of whether offenders learn their lessons and repent, their punishment has moral value for others. For example, criminals demean victims by disregarding and trampling on their moral worth. Punishing offenders vindicates the worth of their victims and humbles wrongdoers by asserting that they are not entitled to abuse others.¹⁵⁰

plaining that when a person's spirit and conscience are insensitive, love requires punishing the body to rouse the spirit and conscience from their sleep).

¹⁴⁶ See R.A. DUFF, TRIALS AND PUNISHMENTS 254-62 (1986); see also THOMAS HOBBES, LEVIATHAN 35 (Michael Oakeshott ed., Basil Blackwell 1960) (1651) (defining "Revengefulness" as "[d]esire, by doing hurt to another, to make him condemn some fact of his own").

¹⁴⁷ DUFF, *supra* note 146, at 259 (following J.M.E. McTaggart's reading of Hegel's theory of punishment).

¹⁴⁸ Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1804 (1999). Indeed, the word "atone" comes from "at one"—atonement makes the offender at one with the victim and the community. OXFORD ENGLISH DICTIONARY 754 (2d ed. 1989).

¹⁴⁹ See Garvey, *supra* note 148, at 180-1; cf. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 & cmt. n.1 (2000) (reducing sentences for defendants who accept responsibility, as manifested by timely confessions, cessation of criminal activities and association, restitution, surrender, and rehabilitative efforts). The idea of repentance is similar:

Repentance is the remorseful acceptance of responsibility for one's wrongful and harmful actions, the repudiation of the aspects of one's character that generated the actions, the resolve to do one's best to extirpate those aspects of one's character, and the resolve to atone or make amends for the [wrong and] harm that one has done.

Jeffrie G. Murphy, *Repentance, Punishment, and Mercy*, in REPENTANCE: A COMPARATIVE PERSPECTIVE 143, 147 (Amitai Etzioni & David E. Carney eds., 1997).

¹⁵⁰ See Jean Hampton, *The Retributive Idea*, in JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 111, 124-32 (1988) (explaining that "the *retributive* motive for inflicting suffering is to annul or counter the appearance of the wrongdoer's superiority and thus affirm the victim's real value").

Punishment thus serves a cathartic function for victims and brings them closure.¹⁵¹ If wrongdoers confess, or better yet, repent and apologize, victims can more readily forgive, surrender resentments, and find peace.¹⁵²

This symbolic moral significance of punishment extends beyond the victim to society at large. Punishment denounces the wrong and reaffirms society's moral teachings.¹⁵³ As James Fitzjames Stephen wrote, "the sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment."¹⁵⁴ Our criminal procedures thus allow the community to vent its outrage, satisfying the public's sense of justice by bringing catharsis and closure.¹⁵⁵

Though the literature often speaks of vindicating the community's norms, it rarely spells out those moral norms. The most prominent norm is the belief that criminal law promotes honesty, good faith, and trustworthiness by stigmatizing perjury, fraud, and the like. By forbidding crimes of violence and property, the law encourages self-discipline, peaceful conduct, and respect for persons and prop-

¹⁵¹ Some might understand this catharsis as simply satisfying the raw primal urge to punish, which arguably is an illegitimate goal of punishment. One can, however, instead understand catharsis as a nobler satisfaction at seeing the law do justice and vindicate rules of right and wrong.

¹⁵² See Hampton, *supra* note 150, at 154 (stating that repentance paves the way for forgiveness and an end to alienation); Jeffrie Murphy, *Forgiveness and Resentment*, in *FORGIVENESS AND MERCY*, *supra* note 150, at 14, 24–26 (same); Garvey, *supra* note 148, at 1827–29 (arguing that when offenders repent and, better yet, apologize, they enable victims to forgive, overcome resentment, and reconcile with the offenders).

¹⁵³ See JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95, 101–05 (1970); ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 370–74 (1981); 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 80–82 (London, MacMillan 1883); Jean Hampton, *An Expressive Theory of Retribution*, in *RETRIBUTIVISM AND ITS CRITICS* 1, 20–22 (Wesley Cragg ed., 1992); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 404–05 (1958); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 *U. CHI. L. REV.* 591, 593, 597–601 (1996); see also EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 105–10 (George Simpson trans., Macmillan 1933) (1893) (noting that "penal law protects against all enfeeblement [by] demanding from each of us a minimum of resemblances without which the individual would be a menace to the unity of the social body").

¹⁵⁴ 2 STEPHEN, *supra* note 153, at 81.

¹⁵⁵ See David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 *U. COLO. L. REV.* 1, 3, 38–41 (1986–87); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570–72 (1980) (stressing importance of visible, comprehensible justice to allow "community catharsis" and to "provid[e] an outlet for community concern, hostility, and emotion"); cf. ARISTOTLE, *POETICS* 25–26 (Gerald F. Else, trans., Univ. of Mich. Press 1967) ("Tragedy, then, is a process of imitating an action which has serious implications . . . through a course of pity and fear completing the purification of tragic acts . . ."); Gerald F. Else, *Introduction and Notes to ARISTOTLE*, *supra*, at 1, 6–7, 97 n.101 (amplifying Aristotle's point that great tragedy plays upon the audience's fear and pity to bring catharsis, purifying or purging the spectator as a form of poetry).

erty. As a rule, it holds people responsible for their actions, treating them as moral agents. Finally, it insists on moral culpability, in the form of *mens rea* and voluntariness, and therefore excuses defendants who act under duress, insanity, infancy, or other incapacity.

In short, criminal punishment is intended to do much more than deter and incapacitate as cheaply and swiftly as possible. It also seeks to educate the offender, induce repentance and reconciliation, vindicate the victim, achieve catharsis, and reinforce societal norms. Of course, criminal law does not always achieve these goals. It does less to educate offenders than it could. Moreover, this lack of education impedes deterrence, repentance, and reconciliation, all of which depend on offenders' learning the errors of their ways. By failing to thoroughly denounce crimes, the criminal law also hinders the vindication of victims and moral norms. Rather than abandon these goals, however, we must bring practice into harmony with these ideals. Subpart B explains how confessions help to teach and change offenders in general and sex offenders in particular.

B. Reluctance to Confess and the Value of Confession

To achieve these goals, the criminal law seeks to lead offenders to repent by humbling them, to exact moral sanctions, and then to return them to the community as equals. Offenders cannot accept responsibility and repent until they admit their actions. Admitting wrongdoing to oneself and to others is not easy, however. Many offenders are in denial about their wrongs. They may feel guilty about what they have done and therefore may be ashamed to admit their wrongs to others.¹⁵⁶ To avoid responsibility, they may publicly or privately deny their acts or awareness, justify or excuse their conduct, or minimize its gravity or harm. In short, they shield themselves from the painful truth by lying to themselves and others.

These problems are most acute in the case of especially heinous or shameful crimes, such as sex offenses.¹⁵⁷ Therefore, it is no coinci-

¹⁵⁶ See Alschuler, *supra* note 10, at 1280 (quoting one defense lawyer as saying "the psychological obstacles to confession in [a sex] case are so often overpowering"); *id.* at 1287 (quoting two defense lawyers, one of whom stated that "[s]ome clients beg to plead guilty while still asserting their innocence. Their egos are so involved in their initial denials of guilt that it is psychologically impossible for them to change," and another of whom said that "[t]here are many things people do that they can never bring themselves to admit. Some defendants are literally insane on this point."); *id.* at 1304 (discussing defendants "who are psychologically incapable of admitting their guilt" and those who want "face-saving denials of culpability—'grace notes' that could enable the defendants to pretend to their families, to their friends, or perhaps even to themselves that they were the hapless victims of circumstance").

¹⁵⁷ See MARC S. CARICH, *SEX OFFENDER TREATMENT OVERVIEW: TRAINING FOR THE MENTAL HEALTH PROFESSIONAL* 20 (1997); BARRY M. MALETZKY & KEVIN B. MCGOVERN, *TREATING THE SEXUAL OFFENDER* 12–27 (1991).

dence that sex offenders are among the most frequent users of *Alford* and *nolo contendere* pleas.¹⁵⁸ Sex offenders deny the facts, their acts, their awareness, or their responsibility, or minimize the wrongfulness or impact of their behavior.¹⁵⁹ They deny guilt to their families, friends, employers, and society at large to avoid shame and embarrassment.¹⁶⁰ They are also "afraid to admit the truth, even to themselves. The thought of being a sexual deviant can be so frightening or repugnant to them that they hide from themselves for years."¹⁶¹

In many cases, these lies and explanations are not simply excuses for public consumption. Rather, they reveal underlying attitudes and cognitive distortions that may lead to more sexual offenses in the future.¹⁶² Offenders who lie to others begin to lie to themselves and

¹⁵⁸ See *supra* Part II.C.

¹⁵⁹ See JUDITH LEWIS HERMAN, *FATHER-DAUGHTER INCEST* 22 (1981) ("Denial has always been the incestuous father's first line of defense."); MALETZKY & MCGOVERN, *supra* note 157, at 27, 164–65, 253–55 (finding that 87% of sex offenders denied all or part of their crime when first interviewed, are often in denial when referred for therapy, and may give lip service to acceptance of responsibility but rarely appreciate the seriousness or harm of their actions); ANNA C. SALTER, *TREATING CHILD SEX OFFENDERS AND VICTIMS: A PRACTICAL GUIDE* 97 (1988); Howard E. Barbaree, *Denial and Minimization Among Sex Offenders: Assessment and Treatment Outcome*, F. ON CORRECTIONS RES., No. 4 1991, at 30, 32 tbl.1 (finding that 54% of rapists denied any offense at all and 42% minimized their responsibility, harm to the victim, or the extent of their actions, and also finding that 66% of child molesters denied the offense and 33% minimized it); Richard M. Happel & Joseph J. Auffrey, *Sex Offender Assessment: Interrupting the Dance of Denial*, AM. J. FORENSIC PSYCHOL., No. 2 1995, at 5, 6 ("It is rare to find incarcerated sex offenders who are completely honest about their sexual deviance or history of sexual offending. Instead they deny culpability and minimize their behavior. Simply put, they fail to understand the traumatic impact of their sexual aberrance."); Nathan L. Pollock & Judith M. Hashmall, *The Excuses of Child Molesters*, 9 BEHAV. SCI. & L. 53, 57 & fig.1 (1991); Diana Scully & Joseph Marolla, *Convicted Rapists' Vocabulary of Motive: Excuses and Justifications*, 31 SOC. PROBS. 530 (1984); Mack E. Winn, *The Strategic and Systematic Management of Denial in the Cognitive/Behavioral Treatment of Sexual Offenders*, 8 SEXUAL ABUSE: J. RES. & TREATMENT 25, 27–28 (1996).

¹⁶⁰ See Happel & Auffrey, *supra* note 159, at 6; William O'Donohue & Elizabeth Letourneau, *A Brief Group Treatment for the Modification of Denial in Child Sexual Abusers: Outcome and Follow-Up*, 17 CHILD ABUSE & NEGLECT 299, 303 (1993) ("Clients . . . reported that the major reason why they were in denial was the fear of consequences, especially the reactions of loved ones.").

¹⁶¹ Happel & Auffrey, *supra* note 159, at 6. In contrast, white-collar defendants are more likely to lie to avoid shame and protect their reputations. See PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 111 (1967) (explaining that white-collar defendants use *nolo contendere* pleas in part to lessen the "public stigma" they suffer); Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 368–72 (1999) (explaining that shaming penalties would be particularly effective in deterring crime by attacking the good reputations that are so precious to white-collar offenders); see also text accompanying note 57 (describing the argument that *nolo contendere* pleas protect "respectable citizens" who are "technically guilty").

¹⁶² See Gene G. Abel et al., *Sex Offenders: Results of Assessment and Recommendations for Treatment*, in CLINICAL CRIMINOLOGY: THE ASSESSMENT AND TREATMENT OF CRIMINAL BEHAVIOR 191, 198–204 (Mark H. Ben-Aron et al. eds., 1985); Gene G. Abel et al., *Complications, Consent and Cognitions in Sex Between Children and Adults*, 7 INT'L J.L. & PSYCHIATRY 89 (1984).

distort their memories and interpretations of events.¹⁶³ For example, a molester might say that there is nothing wrong with having sex with a child,¹⁶⁴ or a rapist might say and believe that the victim asked for it.¹⁶⁵

These cognitive distortions and denials impede treatment. Admitting one's wrongdoing is the first step toward moving beyond it.¹⁶⁶ In twelve-step programs such as Alcoholics Anonymous, for example, admitting that one has a problem is an essential step to recovery.¹⁶⁷ Confessed offenders can no longer rest complacent in the illusions that they are good people. In addition, confessing forces offenders to reveal details of their offenses, which is essential to framing a therapeutic response.¹⁶⁸ Denial prevents therapists from examining cognitive distortions, detecting warning signs, and nurturing empathy for victims.¹⁶⁹ Thus, most treatment programs refuse to admit sex offenders who deny any sexual conduct.¹⁷⁰ Denial, in short, ob-

¹⁶³ See John F. Ulrich, A Case Study Comparison of Brief Group Treatment and Brief Individual Treatment in the Modification of Denial Among Child Sexual Abusers 52 (1996) (unpublished Ph.D. dissertation, Andrews University) (on file with the James White Library, Andrews University).

¹⁶⁴ SALTER, *supra* note 159, at 99.

¹⁶⁵ Happel & Auffrey, *supra* note 159, at 6; see Pollock & Hashmall, *supra* note 159, at 58.

¹⁶⁶ See *McKunc v. Lile*, 536 U.S. 24, 33–34 (2002) (plurality opinion); Winn, *supra* note 159, at 26–27. As the Ninth Circuit noted, “[i]t is almost axiomatic that the first step toward rehabilitation of an offender is the offender’s recognition that he was at fault.” *Gollaher v. United States*, 419 F.2d 520, 530 (9th Cir. 1969) (affirming trial court’s decision to impose a harsher sentence because of defendant’s refusal to admit guilt after he was convicted).

¹⁶⁷ ALCOHOLICS ANONYMOUS, TWELVE STEPS AND TWELVE TRADITIONS 21–24 (1981) (noting that in Step One, an alcoholic must “humbl[e] himself” and be “rigorously honest” as a prerequisite to change); *id.* at 55–62 (stating that in Step Five, alcoholics must humble themselves by admitting their defects to others, in order to pierce self-delusions, rationalizations, and wishful thinking); see Robert A. Moore & Thomas C. Murphy, *Denial of Alcoholism as an Obstacle to Recovery*, 22 Q.J. STUD. ON ALCOHOL 597 (1961).

¹⁶⁸ See Barbaree, *supra* note 159, at 30 (“Therapists depend on offenders’ truthful descriptions of events leading to past offences in order to determine which behaviours need to be targetted [sic] in therapy.”); Diane D. Hildebran & William D. Pithers, *Relapse Prevention: Application and Outcome*, in 2 THE SEXUAL ABUSE OF CHILDREN: CLINICAL ISSUES 365, 367–75 (William O’Donohue & James H. Geer eds., 1992); O’Donohue & Letourneau, *supra* note 160, at 300.

¹⁶⁹ Stefan J. Padfield, Comment, *Self-Incrimination and Acceptance of Responsibility in Prison Sex Offender Treatment Programs*, 49 U. KAN. L. REV. 487, 498 (2001).

¹⁷⁰ Randy Green, *Comprehensive Treatment Planning for Sex Offenders*, in NAT’L INST. OF CORR., U.S. DEP’T OF JUSTICE, A PRACTITIONER’S GUIDE TO TREATING THE INCARCERATED MALE SEX OFFENDER 71, 72–73 (1988) [hereinafter A PRACTITIONER’S GUIDE] (“Most treatment programs will take on only those offenders who admit their guilt. . . . The offender should be able to openly acknowledge guilt. This admission is a basic requirement for meaningful participation.”); BARBARA E. SMITH ET AL., AM. BAR ASS’N, THE PROBATION RESPONSE TO CHILD SEXUAL ABUSE OFFENDERS: HOW IS IT WORKING? 8 (1990) (“With few exceptions, the therapists interviewed said they would not accept anyone in their program who absolutely denied sexual contact with children. Most firmly believed that individuals

structs treatment, which in turn greatly increases the risk of recidivism.¹⁷¹

When wrongdoers do not admit responsibility, many therapists find it helpful to confront them with the facts to force them to come to terms with their behavior.¹⁷² Firmly challenging these denials and distortions is a "very effective" way of overcoming them.¹⁷³ Therapists must actively confront and challenge sex offenders because supportive, passive therapy usually fails.¹⁷⁴ Such challenges may be direct or indirect, led by the therapist or the offenders' loved ones, coupled with empathy, and may consist of asking for explanations and details, questioning inconsistencies, or encouraging the offender to challenge himself.¹⁷⁵ By confronting offenders about their excuses and rationalizations, therapists can trigger feelings of guilt and harness this guilt

who denied the abuse were not amenable to treatment."); O'Donohue & Letourneau, *supra* note 160, at 300.

According to my interviews, *see supra* Part II.C, the sex-offender treatment program in Missouri state prison requires admission of guilt as a condition of therapy. Thus, Missouri judges will not allow sex offenders to enter *Alford* pleas.

¹⁷¹ *See McKune*, 536 U.S. at 33 (noting that untreated offenders are more than five times as likely to recidivate as treated offenders (80% versus 15%), and that denial greatly increases the likelihood that offenders will fail treatment (citing MALETZKY & MCGOVERN, *supra* note 157, at 253-55, and A PRACTITIONER'S GUIDE, *supra* note 170, at xiii)); Lucy Berliner, *Sex Offenders: Policy and Practice*, 92 NW. U. L. REV. 1203, 1209-10 (1998) (reporting two randomized, controlled studies that found higher recidivism rates for untreated sex offenders, and noting that in one study, nearly three-quarters of untreated sex offenders reoffended, compared to one-eighth of treated offenders).

¹⁷² *See* SALTER, *supra* note 159, at 93-95.

¹⁷³ W.L. Marshall, *Treatment Effects on Denial and Minimization in Incarcerated Sex Offenders*, 32 BEHAV. RES. & THERAPY 559, 563 (1994).

¹⁷⁴ WILLIAM E. PRENDERGAST, *TREATING SEX OFFENDERS IN CORRECTIONAL INSTITUTIONS AND OUTPATIENT CLINICS: A GUIDE TO CLINICAL PRACTICE* 105-08, 111-12 (1991).

¹⁷⁵ *See id.* at 107 (suggesting therapists ask for explanations and details or flatly reject the offenders' contentions); MALETZKY & MCGOVERN, *supra* note 157, at 156-58, 160-61 (discussing group confrontation and role-playing); SALTER, *supra* note 159, at 112-17 (describing confrontational group therapy); *id.* at 124-27 (discussing cognitive restructuring); Barbaree, *supra* note 159, at 32 (advocating the use of group therapy to challenge discrepancies); Gad Czudner & Ruth Mueller, *The Role of Guilt and Its Implication in the Treatment of Criminals*, 31 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 71, 73-74 (1987) (suggesting group therapy involving repetition, control, and peer pressure to break down excuses); Michael J. Dougher, *Clinical Assessment of Sex Offenders*, in A PRACTITIONER'S GUIDE, *supra* note 170, at 77, 79 (suggesting that "sex education, group therapy, and cognitive-behavior techniques may be useful" for dealing with cognitive distortions); Randy Green, *Sex Offender Treatment Program Evaluation*, in A PRACTITIONER'S GUIDE, *supra* note 170, at 61, 70 (suggesting confrontation through group therapy and cognitive-behavior therapy); Marshall, *supra* note 173, at 561-62 (discussing group therapy using "supportive but firm challenges" to test veracity and inconsistencies); Winn, *supra* note 159, at 30-33 (endorsing indirect confrontation, challenging offenders to challenge themselves, and eliciting the offender's permission to confront); Ulrich, *supra* note 163, at 298, 309-10 (suggesting that group therapy pushes, pulls, and encourages offenders to confess as they see others doing so).

to induce change.¹⁷⁶ Even external pressures, such as the threat of imprisonment, can induce offenders to overcome their denial.¹⁷⁷

Confessions and denials within the legal system may have effects similar to confessions and denials within therapy. Confessions in open court, even if induced by external pressure, may begin to breach offenders' denial.¹⁷⁸ If offenders who confess later try to recant during treatment, therapists may confront them with the details of their initial confessions. In contrast, repeated unchallenged denials in the legal system only exacerbate offenders' denial reflex, making subsequent treatment even harder.¹⁷⁹ Thus, offenders who enter *Alford* or *nolo* pleas may resist successful treatment and are much more likely to reoffend.¹⁸⁰ For example, one small Minnesota study found that seven out of eight sex offenders who had entered *Alford* pleas reoffended within five years of release.¹⁸¹ This percentage is two to five times the recidivism rate of sex offenders in general.¹⁸²

Two anecdotal interviews with judges indicate that offenders' statements in court affect their own and others' perceptions of their guilt.¹⁸³ One longtime judge reported that he used to allow defendants to plead *nolo contendere*. He found that a defendant would say nothing in court, but upon reporting to a probation officer for a pre-sentence interview would deny guilt. The defendant would also tell his family that he was innocent but that his lawyer had forced him to

¹⁷⁶ Czudner & Mueller, *supra* note 175, at 73–74.

¹⁷⁷ See O'Donohue & Letourneau, *supra* note 160, at 303.

¹⁷⁸ See DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 221–23 (1966); see also Elizabeth Mertz & Kimberly A. Lonsway, *The Power of Denial: Individual and Cultural Constructions of Child Sexual Abuse*, 92 NW. U. L. REV. 1415, 1418, 1457–58 (1998) (noting that the legal system, by challenging denials in the adversary system, “can help to puncture false denials and reveal unpleasant truths”); Schma, *supra* note 87, at 5 (noting that once a defendant has admitted to his guilt at a plea hearing, the judge can use the details of that plea to confront the defendant more effectively at sentencing with the wrongfulness of the behavior).

¹⁷⁹ See Marshall, *supra* note 173, at 562 (noting that when defense lawyers and therapists fail to challenge sex offenders in denial, or even encourage them to exculpate themselves, offenders see these reactions as confirmation and become even more difficult to treat).

¹⁸⁰ See, e.g., MINN. DEP'T OF CORR., SEX OFFENDER SUPERVISION TRAINING, ch. 3, at 4, at <http://www.corr.state.mn.us/organization/commjuv/probationofficermanual.htm> (discussing *Norgaard* pleas, the Minnesota equivalent of *Alford* pleas).

¹⁸¹ *Id.*

¹⁸² See Eric S. Janus & Paul E. Meehl, *Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings*, 3 PSYCHOL. PUB. POL'Y & L. 33, 51–59 (1997) (collecting statistics and settling on recidivism figures between 20% and 45% for sexual offenders); Hollida Wakefield & Ralph Underwager, *Assessing Violent Recidivism in Sexual Offenders*, 10 ISSUES IN CHILD ABUSE ACCUSATIONS 92, 93 (1998) (listing recidivism rates of 13% within four to five years and 39% to 52% within twenty-five years for sexual offenders); *supra* note 171 (collecting statistics that compare recidivism of treated and untreated sex offenders generally, without focusing specifically on the issue of denial).

¹⁸³ See *supra* notes 85 and 178–82 and accompanying text.

plead guilty. As a result, family members would write angry letters to the judge, complaining that convicting an innocent man was a travesty of justice. They would say, for example, that a rape victim was a tramp who consented to sex. At sentencing, the defendant and his family would continue to deny guilt and, at least implicitly, blame the victim. Consequently, victims would be visibly frustrated when making statements at sentencing, feeling that they had to justify themselves. These convicted defendants would continue to deny guilt after sentencing, thus impeding therapy or treatment. Once this judge stopped permitting most *nolo contendere* pleas, however, defense lawyers confronted clients and made them admit guilt, and almost none insisted on going to trial. Defendants and families no longer denied guilt at sentencing or afterwards, the letters from defendants' families stopped, and offenders seemed less defiant, more contrite, and less openly hostile and angry. Victims felt vindicated and expressed healthy outrage instead of frustration at sentencing. Finally, the judge, having heard a detailed plea colloquy, was better able to confront defendants with the details and wrongfulness of their acts.¹⁸⁴ Another judge confirmed these conclusions. He noted that some defendants are agitated and balk at admitting guilt, but they plead guilty when told that trial is the only alternative. These defendants seem calmer and more accepting of responsibility after their guilty-plea allocutions and are less likely to protest innocence and injustice later on.

An analogous dynamic may be at work in insanity cases. Several case studies show that offenders who are found not guilty by reason of insanity resist discussing their thoughts, feelings, and actions.¹⁸⁵ Instead, they externalize their feelings of blame.¹⁸⁶ They may show no remorse, saying "The judge said I was not guilty"¹⁸⁷ or "I have not committed a crime."¹⁸⁸ In contrast, persons with mental illness who are convicted of crimes may react more positively. Society's pronouncement of guilt may spur and reinforce the offender's introspection, acceptance of responsibility, and treatment prospects.¹⁸⁹ In short, "judicial expression[s] of blameworthiness" promote "accept[ance of] emotional responsibility for actions committed during periods of gross mental disorder," which in turn may aid treatment and reform.¹⁹⁰

¹⁸⁴ Cf. Schma, *supra* note 87, at 5 (describing a similar experience).

¹⁸⁵ See Robert A. Fein, *How the Insanity Acquittal Retards Treatment*, in DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 49, 52-55 (1990).

¹⁸⁶ *Id.* at 54.

¹⁸⁷ *Id.* at 53, 54 (internal quotation marks omitted).

¹⁸⁸ *Id.* at 53 (internal quotation marks omitted).

¹⁸⁹ See, e.g., *id.* at 55-57.

¹⁹⁰ *Id.* at 52. I am not arguing that the insanity defense is good or bad—there are many other pros and cons to consider. My point is simply that the law's ascriptions of blame influence an offender's rehabilitation and reform.

Although this evidence comes primarily from the psychological literature on sex offenders, substance abusers, and mentally ill offenders, guilt, psychological blocks, and confessions play similar roles in treating other kinds of offenders.¹⁹¹ Perhaps it is dangerous to generalize, but one might extrapolate based on my interviews that other offenders who enter *Alford* and *nolo contendere* pleas are doing so in part because they face similar psychological blocks.¹⁹² The idea is intuitively plausible. Offenders who are not reluctant to confess enter straight guilty pleas. In contrast, offenders whose psychological barriers impede confession, to others or even to themselves, are the primary users of *Alford* and *nolo* pleas.¹⁹³ They are also presumably those in the deepest denial, and thus, those who most need to come clean.

Some defendants are willing to confess and plead guilty. As Alschuler rightly notes, most guilty pleas are not the fruit of genuine repentance.¹⁹⁴ Instead, defendants feign repentance to earn sentence reductions.¹⁹⁵ But even feigned or induced repentance may teach lessons to some offenders. The very act of confessing and pleading guilty in open court heightens the defendant's awareness of the victim's injury, the norm violated, and the community's condemnation.¹⁹⁶ Indeed, the ordeal of feigning repentance, even if initially done for the wrong reasons, can sometimes lead to genuine repentance.¹⁹⁷ For many, confessing is difficult because it requires admitting shameful

¹⁹¹ See, e.g., Czudner & Mueller, *supra* note 175, at 72–76 (discussing offenders generally, the need for confessions as prerequisites for treatment, and the constructive role of guilt as an inducement to reform, and giving clinical examples of offenders whose crimes ranged from assault to breaking and entering to armed robbery and attempted murder).

¹⁹² See *supra* Part II.C; see also *supra* note 156 and accompanying text (citing similar interviews by Alschuler).

¹⁹³ See Alschuler, *supra* note 10, at 1304 (describing the *Alford* plea as a “crutch” that is needed for “a small group of obviously guilty defendants who are psychologically incapable of admitting their guilt”); *supra* Part II.C.

¹⁹⁴ See Alschuler, *The Changing Plea Bargaining Debate*, *supra* note 38, at 662–63.

¹⁹⁵ See *id.*

¹⁹⁶ See Amitai Etzioni, *Introduction to REPENTANCE: A COMPARATIVE PERSPECTIVE*, *supra* note 149, at 1, 10.

¹⁹⁷ See Garvey, *supra* note 148, at 1850 & n.215 (“A man should always occupy himself with Torah and good deeds, though it is not for their own sake, for out of [doing good] with an ulterior motive there comes [doing good] for its own sake (alterations in original) (quoting Pesahim 50b (H. Freedman trans.), in 4 THE BABYLONIAN TALMUD pt. 2, at 245 (I. Epstein ed., 1938)).

This point should be clear to anyone whose parent ever told him to apologize for hitting a sibling. Even though the child's apology is grudging at first, over time apologizing inculcates the norm that hitting others is wrong and that the child should feel guilty and ashamed of this wrong. Cognitive psychology teaches the same point. According to cognitive dissonance theory, persons who publicly take positions that they do not believe are likely to change their attitudes to bring them into line with their public statements. See KENNETH S. BORDENS & IRWIN A. HOROWITZ, *SOCIAL PSYCHOLOGY* 221 (2d ed. 2002). Thus, offenders who publicly accept responsibility for their crimes, even if they do so insincerely, are more likely to internalize that responsibility than those who persist in denying guilt.

deeds, putting aside excuses, and taking responsibility for one's actions. As my interviews indicated, defense lawyers often have to work with defendants before they admit guilt.¹⁹⁸ The hard work of admitting guilt and repenting may impress upon the defendant the wrongfulness and gravity of the crime. By admitting guilt, however insincerely, defendants let down their denial mechanisms, begin the process of reform, and bring closure to the community.¹⁹⁹

Perhaps many defendants plead guilty cavalierly, confessing the words without confronting their significance. But this description is least true of those defendants who balk most at pleading guilty, namely those who want *Alford* and nolo pleas. These defendants are in the deepest denial and would have to struggle the most to admit guilt. The bigger the struggle, the bigger the defendant's breakthrough when he finally confesses. Indeed, it is a catharsis, literally a cleansing, which is why we often speak of confession as coming clean.

C. The Substantive Value of Trials and the Harm of Guilty-but-Not-Guilty Pleas

Whatever their other flaws, plea bargains induce guilty defendants to confess and start repenting. Some defendants, however, cannot or will not admit guilt. For these guilty defendants, as well as for innocent defendants, the law provides jury trials.²⁰⁰ We usually think

¹⁹⁸ See *supra* Part II.C.

¹⁹⁹ See Gerard V. Bradley, *Plea Bargaining and the Criminal Defendant's Obligation to Plead Guilty*, 40 S. TEX. L. REV. 65, 71 (1999) ("The pleading defendant sets himself on the path to moral reform. By accepting responsibility for his actions, he cements his status as one who recognizes the basic ends of the law of crime and punishment."); *supra* text accompanying note 184 (discussing the changes that a judge noticed in defendants and their families once the judge began refusing to allow nolo contendere pleas); see also MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 38 (1975) (noting community satisfaction at a criminal's own acceptance of responsibility); William Burnham, *The Legal Context and Contributions of Dostoevsky's Crime and Punishment*, 100 MICH. L. REV. 1227, 1236 (2002) (book review) (describing Dostoevsky's "idea that confession is good for the soul and essential to gaining redemption").

The value of confronting guilt and apologizing is a central insight of the restorative-justice movement. Offenders confront their guilt and wrongdoing by meeting with victims, learning about their sufferings, and perhaps apologizing and making amends. See, e.g., JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* 74-82 (2002); GERRY JOHNSTONE, *RESTORATIVE JUSTICE: IDEAS, VALUES, DEBATES* (2002); Garvey, *supra* note 148, at 1840-44. Doubtless many offenders start out admitting wrongdoings and apologizing grudgingly or insincerely. Nonetheless, the hope is that victim-offender mediation, sentencing circles, family-group conferences, and the like will teach offenders moral lessons by making them see the suffering they have caused.

²⁰⁰ I am setting aside cases in which there is some doubt as to the meaning or applicability of a particular law or doctrine, as well as cases in which a defendant is genuinely unaware of whether a particular legal element is satisfied. Both kinds of cases strike me as unusual and might well be classified as cases of possible innocence. I am also setting aside cases in which the dispute is not over guilt but rather the degree or extent of culpability. Again, to the extent that there are good-faith disagreements about the meaning of the law

of jury trials as simply procedural safeguards designed to ensure accuracy and fairness. To borrow Herbert Packer's terminology, there are two dominant approaches to criminal procedure.²⁰¹ Crime-control advocates stress speedy and efficient pursuit of the truth;²⁰² due-process advocates emphasize procedural fairness and perceived fairness.²⁰³ Both views of criminal procedure, however, are incomplete. Trials not only seek fairness, efficiency, and accuracy, but also further the criminal law's substantive moral aims and norms. As Thurman Arnold stated, "Trials are like the miracle or morality plays of ancient times. They dramatically present the conflicting moral values of a community in a way that could not be done by logical formalization."²⁰⁴ The jury serves as the chorus of a Greek tragedy, "the conscience of the community."²⁰⁵ It applies the community's moral code, pronounces judgment, and brands or exonerates the defendant.²⁰⁶ The parade of live witnesses and the solemn pronouncement of guilt confront the offender at length with his wrongful deeds. This litany of accusation, evidence, and condemnation may break through the defendant's denial mechanisms, driving home in undeniable detail the wrongfulness of the crime.²⁰⁷ These morality plays hold out hope for reforming guilty defendants and healing society. Colonial Americans, for example, prized the trial as "an occasion for repentance and reintegration: a ritual for reclaiming lost sheep and restoring them to the flock."²⁰⁸

or the existence of certain facts, these cases fall within the possible-innocence category. To the extent that the law is clear and the defendant knows the facts, these cases are more like cases in which defendants refuse to admit guilt.

²⁰¹ HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 153 (1968).

²⁰² *Id.* at 159.

²⁰³ *Id.* at 163-64.

²⁰⁴ Thurman Arnold, *The Criminal Trial as a Symbol of Public Morality*, in *CRIMINAL JUSTICE IN OUR TIME* 137, 143 (A.E. Dick Howard ed., 1965); *see also* William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1882 (2000) ("Criminal trials are morality plays. Their public nature, and the rituals that surround them, seem designed for sending messages, both about the system's care not to punish the undeserving and about the deserved nature of the punishment the system imposes.").

²⁰⁵ *Witherspoon v. Illinois*, 391 U.S. 510, 519 & n.15 (1968) (explaining also that juries are desirable because they inject "contemporary community values" into the punishment decision).

²⁰⁶ *See* Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 685 (1996) ("Criminal trials are unavoidably morality plays, focusing on the defendant's moral blameworthiness or lack thereof. And the assessment of his moral culpability is, under the Sixth Amendment, a task for the community, via the jury, and not the judge . . ."); Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1462-67 (1995) (justifying the criminal jury as an institution that applies the community's moral sense and sound practical judgment to the context of a particular crime).

²⁰⁷ Alternatively, the preparations for and prospect of facing trials may force offenders and counsel to confront guilt, eventually leading to straight guilty pleas.

²⁰⁸ LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 25 (1993).

For those offenders who refuse to confess or repent, trials still bring catharsis and closure to victims and the community. As one court noted, “[j]ury trials have historically served to vent community pressures and passions. As the lid of a tea kettle releases steam, jury trials in criminal cases allow peaceful expression of community outrage at arbitrary government or vicious criminal acts.”²⁰⁹ The Supreme Court has also stated that “public trials ha[ve] significant community therapeutic value” and bring “community catharsis.”²¹⁰ Trials express respect for the law, communicate values, justify punishment, and encourage offenders to critically examine their acts.²¹¹ Moreover, convictions at trial vindicate victims and the community by denouncing offenders and reaffirming moral norms in the face of their transgression.²¹² This is true regardless of how offenders respond. Conversely, acquittals at trial vindicate innocent defendants and the moral norms on which they acted.²¹³ Consider, for example, the prosecution of John Peter Zenger for seditious libel in colonial America. The jury’s celebrated acquittal proclaimed to all eternity Zenger’s right to criticize the government.²¹⁴

Alford and *nolo contendere* pleas, in the name of efficiency and autonomy, subvert the substantive moral messages that unambiguous

²⁰⁹ United States v. Lewis, 638 F. Supp. 573, 580 (W.D. Mich. 1986).

²¹⁰ Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 570–71 (1980).

²¹¹ See DUFF, *supra* note 146, at 123–27.

²¹² See DURKHEIM, *supra* note 153, at 80–82, 103–10; Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 145–46 (1987); Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 486–87 (1995). As suggested earlier, the victim-vindication and expressive functions of the criminal law (as well as one vision of its educative function) are not contingent on psychological probabilities. Rather, they are analytically tied to the act of punishment in response to a crime. See *supra* Part IV.A. For example, C.S. Lewis argued that if a wrongdoer insists on remaining rebellious and defiant, it is still better to punish him to assert the moral truth in the face of its denial than to leave the truth unvindicated. LEWIS, *supra* note 145, at 121–22. Jean Hampton, Kant, and Hegel also agreed on the need to annul the crime’s false message. See Hampton, *supra* note 150, at 130–33 (arguing, citing Kant and Hegel, that punishment is essential to annul the crime and vindicate the victim’s value, even if the wrongdoer remains defiant and unrepentant); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2192–2206 (2001) (explaining why, according to Hampton and Hegel, punishment’s education and vindication functions are not contingent on the offender’s response, but are analytically inseparable from the offender’s awareness of the punishment).

²¹³ Of course trials can make mistakes in both directions, freeing guilty defendants and occasionally convicting innocent defendants. The point is not that trials are infallible, but rather that trials bring closure by authoritatively proclaiming guilt or innocence. So long as the public trusts that trials are by and large reliable, it matters less that an individual trial may err. These functions of catharsis and closure are jeopardized only when high-profile trials lead to verdicts that the public perceives as flagrantly wrong (such as the acquittals of O.J. Simpson and of Rodney King’s attackers). Even so, there would have to be a number of such cases before the public stopped trusting the results of the average trial.

²¹⁴ See FRIEDMAN, *supra* note 208, at 54–55.

trial verdicts send. *Alford* and to a lesser extent *nolo contendere* pleas are ambiguous on their faces. Guilty-but-not-guilty pleas muddy the moral message by implying that the law does not care enough to insist on clear, honest resolutions and vindications. Truth, justice, self-restraint, and respect for others take a back seat to procedural efficiency and freedom of choice.²¹⁵ By failing to challenge offenders who falsely deny guilt, criminal procedure undermines the criminal law's basic norms of honesty and responsibility for one's actions.

Some authors would prefer to shield guilty defendants from the norms of justice. As Jonathan Kaden recognizes, *Alford* and *nolo contendere* pleas allow defendants to preserve their autonomy, privacy, and dignity by refusing to admit their guilt.²¹⁶ Unfortunately, this autonomy, privacy, and dignity come at the expense of education, repentance, reconciliation, and vindication. Offenders have abused their autonomy and privacy and need to humbly accept responsibility for their wrongdoing.²¹⁷ Herbert Morris notes that offenders have aggrandized themselves at the expense of victims by renouncing compliance with the law.²¹⁸ Punishment seeks to "humbl[e] the [defendant's] will,"²¹⁹ "to bring him low" after he has aggrandized himself.²²⁰ A guilty-plea allocution or a full-fledged jury trial teaches

²¹⁵ Some plea bargains other than *nolo* or *Alford* pleas, especially charge bargains, compromise or shade the truth, but they are beyond the scope of this Article. Though many plea bargains are less than honest in describing charges and less than complete in vindicating justice, at least they do not proclaim this dishonesty or inconsistency openly. *Alford* and *nolo contendere* pleas, in contrast, are internally and facially contradictory.

²¹⁶ See Jonathan Kaden, Comment, *Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination*, 89 J. CRIM. L. & CRIMINOLOGY 347, 382, 389-90; accord *State v. Garcia*, 532 N.W.2d 111, 115 (Wis. 1995) (endorsing *Alford* pleas as a way to allow defendants accused of shameful crimes to "avoid ridicule and embarrassment"). One can question the dignity of entering a plea that many may perceive as dishonest and manipulative. Nonetheless, my interviews with lawyers and judges did indicate that some offenders view these pleas as fig leaves that avert shame and guilt. See *supra* Part II.C.

²¹⁷ Compare Virgil's view, in the *Aeneid*, that the role of a ruler is to keep the peace by humbling the proud and sparing the meek:

Thine be the care, O Rome, to subdue the whole world to thine empire;
These be the arts for thee, the order of peach to establish,

Them that are vanquished to spare, and them that are haughty to humble!

THE AENEID OF VIRGIL book VI, at 278 lines 851-53 (Harlan Hoge Ballard trans., Riverside Press 1902). The Psalmist ties this humbling to the law's function of educating wrongdoers: "It is good for me that Thou hast humbled me, that I might learn Thy statutes." THE PSALTER ACCORDING TO THE SEVENTY *Psalms* 118:71 (Holy Transfiguration Monastery trans., 1997); cf. *Psalms* 119:71 (King James) ("[It is] good for me that I have been afflicted, that I might learn thy statutes.").

²¹⁸ Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 477-79 (1968).

²¹⁹ Herbert Fingarette, *Punishment and Suffering*, 50 PROC. AM. PHIL. ASS'N 499, 510 (1977).

²²⁰ Jeffrie Murphy, *Habred: A Qualified Defense*, in FORGIVENESS AND MERCY, *supra* note 150, at 88, 89; see also KANT, METAPHYSICS, *supra* note 116, at ¶332-¶33 (suggesting that punishment should humble or humiliate some offenders' pride and vanity); KANT, PHILOSOPHY, *supra* note 116, at 197-98 (same).

this lesson to the offender, the victim, and the community. But a quick *Alford* or *nolo contendere* plea short-circuits the process, allowing offenders and their families to remain in denial.²²¹ Offenders avoid the shame and guilt of admitting their deeds, even though they have earned this shame and guilt.

Proponents of *nolo* and *Alford* pleas also argue that these pleas ease the strain on the relationship between defendants and defense counsel. As Alschuler and Steven Walburn suggest, defendants often balk at admitting guilt, even to their lawyers. Defense lawyers can avoid friction by allowing clients to enter *Alford* pleas instead of pressing clients to admit guilt.²²² This view fits with the dominant view of lawyering as gamesmanship in which the defense lawyer's job is to avoid conviction, minimize punishment, and further the client's wishes. Lawyers can serve clients' interests in a variety of ways, from actively confronting and challenging clients when preparing for trial to accepting clients' assertions of fact or expressions of preference.

In the context of defendants who are in denial, however, the gamesmanship model is misguided. It ignores the constructive role that defense lawyers can play in educating and transforming clients' misperceptions and short-term desires. Instead, it takes short-term desires as a given, even when these clients are suffering from psychological blocks that obstruct their long-term interests and values.²²³ Lawyers can recognize that substance abuse, mental illness, psychological blind spots and denial, or simple shortsightedness impedes their

²²¹ See *supra* text accompanying note 184 (relating anecdotal evidence that defendants who enter *nolo* pleas and their families remain defiant and in denial, which further injures victims and impedes offender treatment, whereas defendants who must plead guilty do not continue to maintain innocence to themselves and their families, thereby facilitating therapy and healing victims).

²²² See Alschuler, *supra* note 10, at 1287–90; Walburn, *supra* note 54, at 143.

²²³ See David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 472–73 (arguing that lawyers should disregard their clients' immediate wants when they conflict with their values or interests); cf. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 8–10, 138–69 (1998) (opposing the dominant view that calls for lawyers to serve only their clients' interests, and instead proposing that lawyers take "such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice").

In contrast to defense counsel, guardians are often authorized to put their wards' long-term interests above their short-term desires. See Frances Gall Hill, *Clinical Education and the "Best Interest" Representation of Children in Custody Disputes: Challenges and Opportunities in Lawyering and Pedagogy*, 73 IND. L.J. 605, 617–24 (1998) (defending the need for guardians *ad litem* to place minors' interests above their expressed desires, because minors may lack cognitive skills, maturity, and judgment, or may harm themselves). The Model Rules of Professional Conduct distinguish between the roles of guardians and lawyers by providing that, to the extent possible, lawyers should treat disabled clients just like any other clients. MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2002). The Rules recognize, however, that in some situations wards need guardians to make decisions for them or at least guide them in making these decisions. MODEL RULES OF PROF'L CONDUCT R. 1.14(b) (2002).

clients' rationality.²²⁴ More importantly, they can persuade clients to face up to patterns of behavior that, if left unchecked, will lead to more crimes and punishment.²²⁵ As suggested by the psychological literature cited earlier, lawyers can confront their clients with the overwhelming evidence of guilt and break down their denials.²²⁶ Furthermore, lawyers can provide moral as well as legal counsel, advising clients that it is right to admit their crime, apologize to victims, and move forward.²²⁷ By penetrating clients' denials to others and themselves, defense counsel can begin the process of honesty, education, and reform.

Some, but not all, defense attorneys do challenge their clients. Other lawyers say, "Yes, you are innocent, but a jury would probably convict you at trial, so enter an *Alford* or *nolo contendere* plea." As one psychologist notes, defense lawyers exacerbate the problem by failing to challenge their clients' denials.²²⁸ The dominant client-centered approach to legal counseling discourages painful confession.²²⁹ Indeed, some defense lawyers purposely avoid learning all the facts about guilt, so that they remain free to make arguments that run counter to the undiscovered facts.²³⁰ This see-no-evil approach not only leaves offenders' illusions and denials in place but also com-

²²⁴ See, e.g., David B. Wexler, *Some Reflections on Therapeutic Jurisprudence and the Practice of Criminal Law*, 38 CRIM. L. BULL. 205, 206-08 (2002) (citing the example of a defense lawyer who will accept cases from habitual drunk drivers only if they accept responsibility and get treatment for their underlying alcoholism, which can mitigate punishment and serve clients' long-term interests).

²²⁵ See *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 834-35 (Minn. 1991) (noting the important role that defense counsel play in drunk-driving cases in encouraging problem drinkers to seek treatment); Astrid Birgden, *Dealing with the Resistant Criminal Client: A Psychologically-Minded Strategy for More Effective Legal Counseling*, 38 CRIM. L. BULL. 225, 227-29, 238-42 (2002); Wexler, *supra* note 224, at 206-08; Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, 5 PSYCHOL., PUB. POL'Y & L. 1034, 1041, 1066-76 (1999).

²²⁶ See Wexler, *supra* note 67, at 286; *supra* note 67 and accompanying text.

²²⁷ MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002) ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.").

²²⁸ This tendency to resist challenges is all too frequently exacerbated by the fact that their defense lawyer has, perhaps unintentionally, encouraged them to present an exculpatory view of the offense. . . . This encouragement by lawyers[,] and a failure to challenge by professionals, are seen by the offender as confirmation of his claims and this, of course, makes him all the more resistant to challenges. Repeated disclosures followed by supportive challenges are, therefore, necessary.

Marshall, *supra* note 173, at 562; see *supra* text accompanying note 179.

²²⁹ See Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons from Dostoyevsky*, 35 HOUS. L. REV. 327, 381-83 (1998) (opposing client-centered counseling's emphasis on avoiding the painful consequences of confession, and proposing instead that lawyers serve as clients' friends, offering moral counsel and perhaps encouraging clients to confess in order to reap forgiveness and reconciliation).

²³⁰ KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 103-04 (1985).

pounds them. Clients interpret this failure to challenge as confirmation and become even more resistant to the challenges required during therapy and rehabilitation.²³¹ Instead of repenting and moving forward, offenders may continue to pity themselves, focusing their energies on collateral attacks instead of making amends. The focus of the criminal process should be teaching the offender and opening his eyes during his journey to prison. Allowing defense counsel to take the easy way out impedes the learning process and disserves the client's long-term interests. Judges and prosecutors should also focus more on healing, teaching, and vindicating than on serving their own selfish or shortsighted interests in clearing their dockets.

Even if *Alford* and *nolo contendere* pleas do not impair the offender's own education and reform, they hurt others by undercutting deterrence. Offenders dislike admitting guilt and suffering collateral estoppel in related civil lawsuits.²³² *Alford* pleas allow offenders to avoid declaring guilt, and *nolo contendere* pleas let them avoid both admitting guilt and collateral estoppel at the expense of victims and the civil courts. Victims already find it difficult with the benefit of estoppel to collect compensation and restitution. *Nolo contendere* pleas compound the problem by letting offenders relitigate their convictions. Victims and civil courts must spend more time and money to collect compensation. Yet there is no good reason to allow relitigation: if there is proof beyond a reasonable doubt of a crime, then a fortiori there is proof by a preponderance of the evidence, and estoppel should attach.²³³ The failure to estop defendants and reinforce guilt is yet another way that these pleas equivocate and undermine the criminal law's message.

Alford and *nolo contendere* pleas also hurt victims and the community by preventing victims' vindication. Victims lose their day in

²³¹ Marshall, *supra* note 173, at 562.

²³² Much of this Article argues that honest admissions of guilt serve important moral goals that are incommensurable with other goals such as cost saving and deterrence. If one rejects this moral approach and analyzes the problem solely from an economic standpoint, one must balance the additional deterrent effect of having to admit guilt against the costs of additional trials. Though in theory one could imagine trading off admissions of guilt in particular cases for cost saving and other ways of achieving deterrence, in practice a blanket ban on *Alford* and *nolo contendere* pleas is preferable. First, a blanket ban sends a clear, unequivocal message to the public and prospective criminals. Second, prosecutors and judges suffer a serious agency-cost problem. As Part II.C suggested, they may prefer to allow *Alford* and *nolo contendere* pleas to reduce their own workloads, even when the long-term effect is to undercut deterrence. Thus, the better rule is a complete or nearly complete ban.

²³³ It is hard to know exactly how significant estoppel is in practice or how often it becomes an issue in subsequent civil litigation. My interviews revealed that it was mentioned frequently as a justification for *nolo contendere* pleas, implying that the prospect of civil litigation comes up with some regularity. This is particularly true in automobile-accident cases because insurance companies with deep pockets are involved. See *supra* Part II.C.

court, their chance to vent their sorrows and ask for justice, without receiving even an admission of wrongdoing or an apology.²³⁴ Molestation victims, for example, can suffer more harm when courts appear to accept the molesters' denials, because this judicial acceptance seems to suggest that the victims are liars.²³⁵ Traumatized victims seeking closure may be more reluctant to pursue these claims at all, and thus society loses the authoritative vindication of its norms and the repudiation of the wrong. Instead of communicating that punishment is moral denunciation based on true desert, society treats it as a marketable good, undermining its moral authority.²³⁶ Of course, many pleas are not well publicized, but to the extent that victims and the public do learn of such pleas, they take away the wrong message. Simply put, the efficiency of these pleas undermines catharsis, expressive condemnation, and vindication of the community's norms.

Alford and *nolo contendere* pleas may well be constitutional.²³⁷ But constitutionality does not equal wisdom, and though our Constitution may tolerate these pleas, they are nonetheless unwise and should be abolished. Indeed, *Alford* left this option open, recognizing

²³⁴ See Carrie J. Petrucci, *Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System*, 20 BEHAV. SCI. & L. 337, 351–52 (2002) (noting that apologies correct victims' self-blame, reduce feelings of aggression and anger, promote healing, and empower victims). This lack of vindication explains why victims sometimes try to dissuade prosecutors from accepting *Alford* and *nolo* pleas. See Broder, *supra* note 30 (noting that the family of a murder victim agreed to plea bargains for four defendants "provided that each defendant publicly admitted his or her part in [the victim's] death"); Robert Airoidi, *Ex-Fremont Priest Accepts Deal*, DAILY REV. ONLINE, at <http://www.dailyreviewonline.com/Stories/0,1413,88%257E10975%257E1035690,00.html> (Dec. 7, 2002) (reporting that the victim of a child molester insisted that the defendant plead guilty rather than no contest, stating that "[i]t wasn't about the time he served, it was about admitting guilt"). In states with victims' bills of rights, victims may be able to submit written statements to courts at sentencing, see, e.g., ME. REV. STAT. ANN. tit. 17-A, § 1174 (West Supp. 2001), but this vindicates them less than being heard at trial or receiving an admission of guilt at a guilty plea hearing.

²³⁵ O'Donohue & Letourneau, *supra* note 160, at 299–300 ("[C]ontinued denial can cause further harm to the abused child in that implicitly or explicitly, the child is being characterized as a liar and perhaps not believed by some.").

²³⁶ See Alschuler, *The Changing Plea Bargaining Debate*, *supra* note 38, at 670–80 (arguing that plea bargaining wrongly commodifies freedom, the right to be heard, and penological objectives and sells them very cheaply); Alschuler, Book Review, *supra* note 39, at 1041 (noting that plea bargaining "encourages . . . defendant[s] to believe that [they] ha[ve] sold a commodity and . . . gotten away with [their crime]," thereby cheapening the system); see also Kahan, *supra* note 153, at 593 (explaining that fines are no substitute for imprisonment because the public interprets them as licensing crimes so long as the offender is willing to pay, thus undermining the criminal law's message of moral condemnation); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1903–09 (1987) (arguing that certain goods central to human flourishing must remain inalienable and therefore should not be commodified).

²³⁷ See *supra* note 41 and accompanying text (noting the historical pedigree of *nolo contendere* pleas and the dispute over whether in fact they were available for felonies and offenses punishable by imprisonment).

that these pleas are permissible but not required.²³⁸ Legislatures are perfectly free to ban these pleas. Until they do so, judges are free to reject these pleas, prosecutors may vigorously oppose them, and defense counsel may advise their clients to confront guilt instead of taking the easy way out.²³⁹ Unequivocal pleas or trials may be less efficient and require more work, but in the long run they better serve the moral values underlying the criminal law.

CONCLUSION

The legal system has streamlined the guilty-plea process to allow the maximum entry of guilty pleas with a minimum amount of work. We are so obsessed with efficiency that even a defendant's protestations of innocence do not give us pause. This assembly-line approach to criminal procedure downplays the importance of innocence and fairness. It also ignores important substantive values of the criminal law, which should carry great weight or even take precedence over procedural values. Scholars should closely scrutinize procedures that may undercut substantive values, but they do not.

This problem reflects a broader gulf between procedure and substance. Scholars often reify the artificial curricular distinctions between subjects, which can obscure how procedure serves or hinders substance and vice versa. We often ask whether a given procedure is efficient, accurate, or constitutional. Efficiency, in particular, has driven us to our wholesale embrace of guilty pleas, lest we be burdened with expensive and time-consuming trials. But we rarely ask if a procedure deters, educates, inflicts retribution, or produces catharsis. Nor do we ask if it undercuts the criminal law's moral norms, such as honesty, trustworthiness, self-discipline, nonviolence, and respect for others.

Looking at procedures through this substantive-values lens, the disappearance of jury trials is cause for more concern. Jury trials are far from efficient and sometimes inaccurate. But they serve as morality plays, expressing the community's conscience, allowing victims to voice grievances, and teaching offenders and others by vindicating society's norms. Unfortunately, jury trials have all but disappeared, accounting for fewer than four percent of all cases.²⁴⁰ Therefore, we

²³⁸ North Carolina v. Alford, 400 U.S. 25, 39 (1970).

²³⁹ No-contest pleas might be necessary in isolated cases, such as when a defendant was truly too intoxicated to remember anything and a trial would traumatize a vulnerable witness, or in traffic cases when a tort suit will resolve the fault issue and the minor violation carries less moral significance. These types of justifications, however, should be exceptional. It is hard to imagine any case in which an *Alford* plea would be needed, particularly because *Alford* pleas are more equivocal.

²⁴⁰ See U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2001, at 419 tbl.5.22, <http://albany.edu/sourcebook/1995/pdf/t522.pdf> (compiling statistics that

should at least try to incorporate these substantive values into our plea and sentencing procedures.

I suggested in Part IV that this substantive-values approach might require rethinking the role of defense counsel. Instead of taking their clients' desires as a given, defense counsel might try to educate and serve their long-term interests. For example, defense counsel might do their clients a great service by pressing them to seek drug treatment. Scholars should likewise rethink the roles of judges and prosecutors. The issue is not simply one of favoring defendants versus favoring prosecutors—that view buys into the stale dichotomy between crime-control and due-process approaches.²⁴¹ Rather, it is time to transcend this zero-sum way of looking at criminal procedure as efficiency versus fairness, and instead think about what other values prosecutors, judges, and defense lawyers should serve. The win-at-all-costs mentality that sometimes prevails at the bar might give way to a broader approach. Perhaps the right incentive structures could encourage prosecutors and judges to care less about maximizing convictions and case dispositions and more about teaching, vindicating, healing, and reconciling.

For example, at guilty-plea allocutions, defendants can choose to fully and honestly admit guilt and express remorse. Instead, they often combine grudging admissions with excuses, evasions, or deflections of blame. Currently, the Federal Sentencing Guidelines are vague as to when guilty pleas will earn sentencing reductions for acceptance of responsibility.²⁴² In practice, however, many judges automatically award full acceptance-of-responsibility reductions for any guilty plea.²⁴³ Many do so no matter how grudging the defendant's

show that in 2001, of 68,633 federal defendants whose cases were not dismissed, 93.8% pleaded guilty or nolo contendere, 2.2% had bench trials, and 4% had jury trials); *id.* at 445 tbl.5.44, <http://albany/edu.sourcebook/1995/pdf/t544.pdf> (compiling statistics that show that in 1998, 94% of state felony convictions were by guilty plea, 3% by jury trial, and 3% by bench trial).

²⁴¹ See *supra* text accompanying notes 202–03.

²⁴² For example, the Guidelines provide that:

Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable . . . will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. n.3 (2000).

²⁴³ See Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1534, 1539–42 (1997) (noting that in many but not all federal districts, judges automatically award acceptance-of-responsibility discounts to all defendants who plead guilty).

admissions and how little remorse he displayed.²⁴⁴ This approach makes sense if our only concern is the efficiency of avoiding trials. But if moral education and reform are also important goals of the criminal process, then judges should calibrate the rewards to the defendant's contrition and candor. If a defendant's full acceptance of responsibility mattered, defense attorneys would press their clients to come to terms with their misdeeds. Of course, some defendants would still admit guilt only grudgingly or insincerely, but those offenders may be most in need of punishment to break through their half-denials. Furthermore, even insincere apologies and promises of reform have value.²⁴⁵

Judges and victims can also help inject substantive values into plea and sentencing procedures. For example, judges should consider defendants' demeanors when imposing sentence to assess what lessons they need to learn. Thus, the judge who will impose sentence should hear the guilty plea whenever possible instead of passing the plea off to a magistrate, as federal judges often do.²⁴⁶ Judges also could insist on more detailed allocutions and use more overtly moralistic language, driving home the wrongfulness of the crime. Similarly, victims could confront offenders at plea or sentencing, giving voice to the grief they have suffered. This evidence would serve neglected substantive values such as retribution, catharsis, and closure, and could counteract prosecutors' temptations to sacrifice these values for efficiency.²⁴⁷ Finally, the rhetoric of sentencing could become less a desiccated recitation of Sentencing Guidelines mathematics and more an expressly moral judgment on wrongdoing.

This Article's substantive-values approach can apply in a range of ways. A modest view would simply add substantive values to the balance or mix of values that proceduralists currently consider. A stronger view would say that these substantive values should become the dominant concern of criminal procedure, although this approach conflicts with some entrenched features of our system. For example,

²⁴⁴ See *id.* at 1538. But see *id.* at 1539–40 (noting that in twenty-eight aberrant cases studied, defendants who “denied or minimized their culpability” did not receive the reduction).

²⁴⁵ For example, compliance theory suggests that defendants who publicly commit to reform in front of a judge and loved ones are much more likely to reform. See David B. Wexler, *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process*, 27 CRIM. L. BULL. 18, 26–27, 32 (1991) (making the proposal for conditional release of defendants who have been found not guilty by reason of insanity).

²⁴⁶ See, e.g., *United States v. Ciapponi*, 77 F.3d 1247, 1251 (10th Cir. 1996); *United States v. Williams*, 23 F.3d 629, 632–33 (2d Cir. 1994); *United States v. Khan*, 774 F. Supp. 748, 756 (E.D.N.Y. 1991).

²⁴⁷ See David A. Starkweather, Note, *The Retributive Theory of “Just Deserts” and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853, 874–75 (1992) (noting that prosecutors must serve conflicting goals, one of which is the “swift disposition of cases”).

an important strain of this Article's argument has favored a more moral, didactic emphasis in proceduralist reasoning. One might use this approach to scrutinize the messages sent by established procedures such as exclusionary rules, plea bargaining, the adversary system, and even our rights-based approach. My point is not to resolve the tradeoff between substantive and procedural values, nor to discuss how much scholars must accommodate established practice. Procedural values, *stare decisis* concerns, and practical problems will all limit the implementation of substantive values. My point is simply to show the range of procedures that one could examine using this new lens.

Implementing these substantive values will not be simple, because they may be less convenient and might require more time and effort per case. But the cheapest and fastest methods are not always the best. Criminal law should not be simply about locking up offenders cheaply.²⁴⁸ If one purpose of criminal law is to educate the public and teach offenders lessons, we must be willing to spend money. Procedure must reinforce substance, instead of sacrificing it on the altar of shortsighted efficiency.

This bridging of the procedure/substance divide is part of a broader project to refocus criminal procedure. Criminal procedure scholarship has been so preoccupied with the constitutionality of rules that it has neglected their wisdom. Moreover, scholars focus so much on what the U.S. Supreme Court does that we ignore the rest of the actors in the process. The Constitution, however, sets only a floor, not a ceiling. The Supreme Court permits *Alford* pleas, but that does not mean that legislatures, prosecutors, defense lawyers, and trial judges should use them. It is time to move beyond our ivory-tower focus on the Supreme Court and constitutional law, and to scrutinize how procedures do and should interact with substantive values in the real world.

²⁴⁸ See Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 849 (2001) (noting that criminal justice treats offenders and victims as "irrelevant nuisances," "annoying sources of inefficiency in a system built to incapacitate the greatest number of source individuals for the longest possible time with the least effort").